IPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC.,
Appellant,

—v.—

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., and HERRIN TRANSPORTATION CO.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

Appellant Strickland Transportation Company, Inc., of Dallas, Texas ("Strickland") appeals from the judgment of the United States District Court for the Central District of California, entered on December 2, 1968, and adhered to on January 27, 1969, upholding certain orders of a sharply-divided Interstate Commerce Commission which, in essence, disapproved Strickland's proposed purchase of two portions of the motor carrier operating rights of England Transportation Company of New Orleans, Louisiana ("England"). This Statement is submitted to show that this Court has jurisdiction over the appeal, and that

the questions presented are substantial and deserving of plenary consideration.

OPINIONS BELOW

The December 2, 1968, order of the three-judge District Court (constituting also its opinion) is reported at 293 F. Supp. 858. Copies of that order and of the District Court's January 27, 1969, order denying Strickland's timely motion for reconsideration and amendment of findings are appended hereto as Appendices A & B, respectively (pp. 1a to 5a and 6a to 7a, *infra*). The Report of the majority of the Interstate Commerce Commission ("Commission") disapproving Strickland's purchase and reversing a contrary Report and Recommended Order of the Commission's Hearing Examiner, and the dissent filed by four Members of the Commission who would have affirmed the Examiner, are reported as *Strickland Transportation Co., Inc.—Purchase (Portion)—England Transportation Co. Inc.*, 104 M.C.C. 297. Copies of the Report and of the dissent thereto, and of the Commission order then entered are attached as Appendix C (pp. 8a to 40a). A copy of the Commission's order on petition for reconsideration is attached as Appendix D (pp. 41a to 43a, *infra*).

JURISDICTION

This action was maintained by Strickland pursuant to 28 U.S.C. §§ 1336, 1339, 2284 and 2321-25, to set aside the orders of the Commission which disapproved Strickland's purchase of the rights which it had sought to acquire.[1]

[1] The action was originally filed by Consolidated Copperstate Lines, Montebello, California ("Copperstate"), to set aside other aspects of the same orders of the Commission. Strickland and Copperstate each had separately entered into an agreement with

Strickland's applications had been approved by the Hearing Examiner but disapproved by a sharply divided Commission, six to four.

Various motor carriers which had opposed the England transaction before the Commission intervened in support of the defendant Commission and the United States. On December 2, 1968, the District Court entered a judgment as part of a short *per curiam* opinion sustaining the Commission majority. On December 11, 1968,[2] Strickland timely filed a motion requesting the District Court to vacate its judgment, to amend its findings, to make certain additional findings, and for further relief. On January 27, 1969, the District Court denied Strickland's motion and adhered to its original decision. On February 4, 1969, on Strickland's application[3] Mr. Justice Harlan ordered that the Commission's December 12, 1968, order fixing February 10, 1969, as the termination date of Strickland's

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England, or an affiliate of England, each to acquire a specified portion of the England operating rights. The two applications were consolidated before the Commission and were disposed of by it in a single report and through the same orders. Strickland's procedural position in the action below was technically that of an intervening plaintiff (28 U.S.C. §2323); it intervened after the Copperstate complaint was filed. Strickland's intervening complaint was restricted to seeking the setting aside of the portions of the Commission's orders which denied its own applications.

We are advised that Copperstate is also appealing to this Court from that portion of the order of the District Court which affirmed the Commission's action on its application. While the Strickland and Copperstate applications were disposed of in the same Commission proceeding and their judicial review proceedings below were determined together, the two cases do not raise common issues of fact or law.

[2] The Clerk of the District Court originally docketed this motion as filed December 30, 1968, but the District Court ordered this error corrected by *nunc pro tunc* order filed February 3, 1969.

[3] A similar application made to the District Court had been denied.

temporary authority to operate the England routes in question be stayed pending this Court's action upon Strickland's Jurisdictional Statement, which Mr. Justice Harlan required (as a condition of the stay) to be filed on or before March 10, 1969. Strickland on February 10, 1969, filed its Notice of Appeal in the District Court.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining the jurisdiction include *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F.R. Co.*, 387 U.S. 397 (1967), *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962), and *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962).

STATUTES AND RULES INVOLVED

Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, governs applications for Commission approval of transactions involving the acquisition of rights of one carrier by another. The statutory test is whether the transaction is "consistent with the public interest." Section 207 of the Act, 49 U.S.C. § 307, governs issuance of motor carrier certificates of public convenience and necessity. In 49 C.F.R. Part 1057, the Commission has promulgated rules relating to the lease and interchange of vehicles.[4] The pertinent parts of all these provisions are set forth in Appendix E (pp. 44a to 50a, *infra*).

[4] These rules were renumbered in December 1967. At the time of the proceedings before the Commission, they were found at 49 C.F.R. Part 307, and are so cited in the Commission's Report.

QUESTIONS PRESENTED

1. Did the Commission err in holding that the equipment interchange between Shreveport and New Orleans which England and Strickland had participated in for three years, involving the exchange of fully loaded trailers pursuant to an agreement whereby England was paid a flat sum per trailer for carrying the trailers between the two points, was unlawful, and hence that England's Shreveport-New Orleans route was constructively dormant?

2. Did the Commission err in declining to approve the purchase by Strickland of England's Monroe-New Orleans operating rights on the ground that the Hearing Examiner had *sua sponte* recommended the conversion of the irregular authority for which Strickland had applied to regular authority, and that the resulting regular authority—for which Strickland had not applied—was a "new service" requiring a fresh showing of public convenience and necessity to authorize its transfer?

3. Was Strickland deprived of essential procedural rights when the Commission rested its decision on factors not raised by the parties or previously considered in the proceeding and then denied Strickland any opportunity to respond to the new issues injected into the proceeding by the Commission's Report?

STATEMENT

The Factual Background.—On May 1, 1964, England, a common carrier by motor vehicle certificated to carry general commodities on irregular routes including New Orleans-Shreveport and New Orleans-Monroe, ceased operations due to labor difficulties, and on June 17, 1964, sold its operating rights and equipment at public auction. The successful bidder for the New Orleans-Shreveport and New Orleans-Monroe portions of those rights was Strickland, a long-line common carrier by motor vehicle of general freight between Eastern and Midwestern points, on the one hand, and New Orleans and various other Louisiana, Texas and Arkansas points, on the other.

The background of Strickland's interest in acquiring England's Shreveport-New Orleans and Monroe-New Orleans routes is as follows: In 1958, the Commission extended Strickland's operating authority into New Orleans over the protests of various carriers that the effect would be to authorize Strickland to serve in competition with them the New Orleans-Northeast market.[1] Strickland has direct authority to serve New Orleans itself from northeast and midwest points only over circuitous Texas routes, via Texarkana and either Dallas or Houston to New Orleans. Were Strickland able to serve New Orleans via Little Rock and Shreveport, points to which it is certificated, its route to New Orleans would benefit from a substantial saving in mileage.[2] Accordingly, in 1960 Strick-

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[1] *Strickland Transportation Co., Inc., Extension—Louisiana Routes,* No. MC-59680 (1958); see Petition of Protestants for Reconsideration, especially Specification of Error No. 27, p. 60.

[2] Circuity would still exist, but to a lesser extent. The most direct route to New Orleans from the midwest traverses the State of Mississippi, which Strickland does not serve.

land applied for Commission approval of a proposed acquisition of the stock of England, whose rights between Shreveport and New Orleans would have ameliorated Strickland's circuity problem. The Commission withheld approval in the light of factors then present, but in so doing it stated plainly that the two carriers could combine operations over Shreveport, noting that "such a service could be inaugurated by the carriers at any time," *i.e.*, through interchange. *Strickland Transportation Co., Inc.—Control—England Transportation Co., Inc.*, 85 M.C.C. 549, 555 (1960).[3]

Strickland and England followed the Commission's suggestion, and commencing in the following year, 1961, inaugurated a coordinated service.[4] Strickland continued to

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[3] The routes of Strickland, and those of England which Strickland contracted with England to acquire subject to the Commission's approval in the proceedings of which this appeal is part of the judicial review, are set forth on the map on page 9.

[4] In 1960 Strickland pursued an alternative means of alleviating its circuity problem. It negotiated an intermodal trailer on flatcar ("TOFC"), or "piggyback," arrangement with the Illinois Central Railroad ("IC"), which reduced transit time by a full day. In response to a protest from a competitor, Strickland desisted from that arrangement, pending adjudication by the Commission of its legality. In *Gordons Transports, Inc.* v. *Strickland Transportation Co.*, 318 I.C.C. 395 (1962), *aff'd*, 219 F. Supp. 618 (N.D. Tex. 1963), the Commission—over the strong dissents of four members—concluded that in light of the effect on competition and the then-current view that no motor carrier could participate in so-called "Plan III" TOFC, this particular TOFC arrangement was unlawful, although conceding that the whole matter of TOFC rules was under "comprehensive analysis" in a proceeding known as *Ex parte 230*. See 318 I.C.C., at 402. The Commission subsequently did clarify those rules, *approving* the Strickland-IC type of "Plan III" all-rail TOFC service, as well as joint intermodal or "Plan I" piggyback service, with loaded trailers moving by railroad on the motor carrier's bill of lading at regular motor carrier rates with all billing done by the motor carrier and the rail carrier's compensation determined by negotiation between the carriers. The Commission did impose, although

interline individual shipments with England over Shreveport, but—more frequently—commenced interchanging fully loaded trailers at Shreveport for delivery by England to New Orleans, and vice versa as to northern-bound shipments. This trailer-for-trailer interchange lasted until England ceased operations on May 1, 1964. It was well-publicized, well-known to the shipping public and to competitors, and heavily patronized—particularly by shippers in the Northeast. In 1963, for example, the interchange participants exchanged 2,071 loaded trailers, and between November, 1963, and April, 1964, 966. Examiner's Report ("Ex. Rep."), at 10.

When freight destined for New Orleans was accumulated in trailer lots at Strickland's break-bulk terminal in Little Rock, Arkansas, it was carried in a trailer sealed to control pilferage to Shreveport over Strickland's own route where it was exchanged, pursuant to agreement, for a trailer then in England's possession. England then carried the trailer over its own routes to Strickland's terminal in New Orleans, where the freight therein was broken down and

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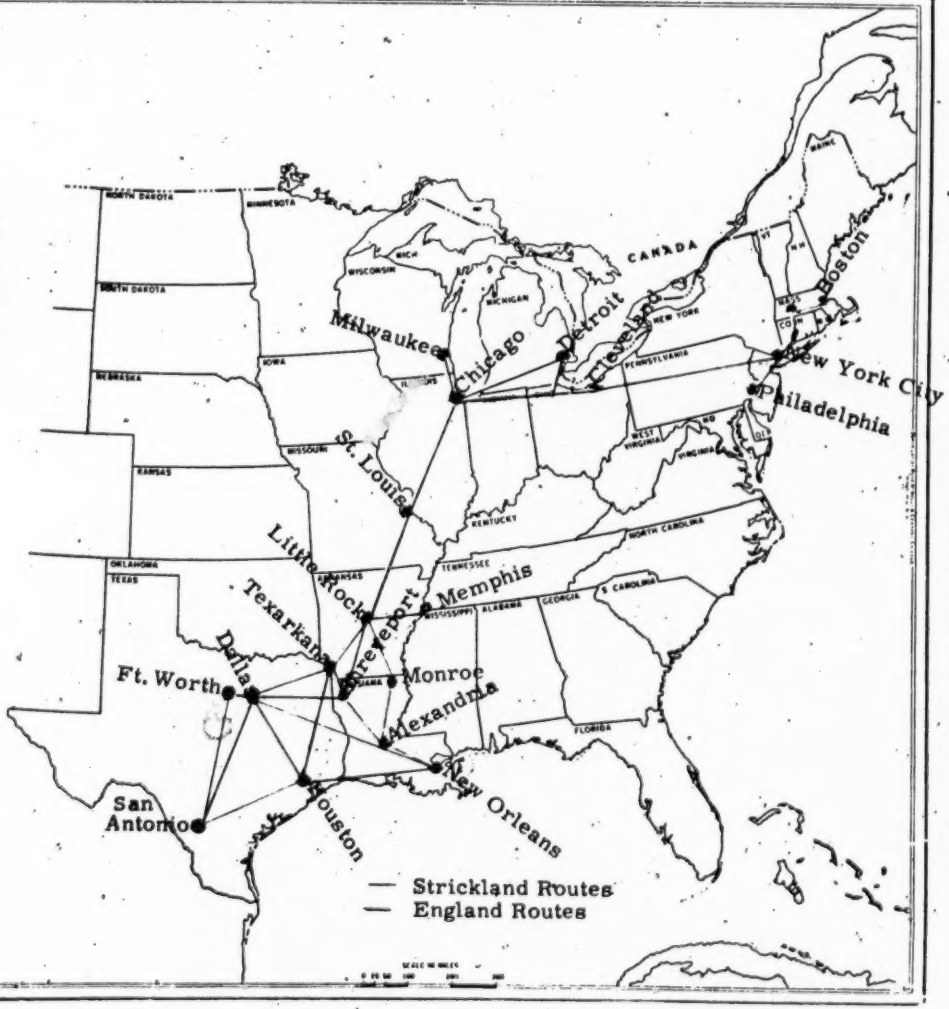
only prospectively, a circuity limitation (the saving in distance may not be more than 15%). See *Ex parte 230, Piggyback Service,* 322 I.C.C. 301 (1964), *rev'd in part,* 244 F. Supp. 955 (N.D. Ill. 1965), *but aff'd in whole, sub nom. American Trucking Ass'ns* v. *Atchison, T. & S.F.R. Co.,* 387 U.S. 397 (1967). In short, the Commission's own final TOFC rules sustained the views of the dissenters in *Gordons,* and would have validated the Strickland-IC Plan III joint intermodal piggyback arrangement had it not been cancelled as a result of the earlier litigation.

As the Commission frankly conceded immediately after citation to the *Gordons* case, "The information that we have received from the parties and the arguments which we have read and heard make it apparent that there are many differences of opinion as to the wisdom and the correct application of some of our past decisions." 322 I.C.C., at 323. In the circumstances, this can fairly be said to have been a virtual "confession of error."

For a general discussion of the types of TOFC plans, see this Court's opinion in *American Trucking Ass'ns* v. *Atchison, T. & S.F.R. Co., supra,* 387 U.S. 397.

This map shows in red Strickland's routes and in green the two England routes which Strickland applied to acquire.



distributed by Strickland under its unrestricted New Orleans rights which included local delivery rights. A similar procedure was followed at New Orleans respecting northbound traffic. As its share of the revenues on such shipments, England received first $125 per trailer; later, after a renegotiation between the carriers, $160 per trailer. With respect to the making of bills of lading for such shipments, Strickland, the originating carrier, cut a waybill when it received freight from the shipper. If it was determined at Little Rock (or at New Orleans with respect to northbound traffic) that the freight would be shipped via the Shreveport interchange, that routing and the identity of the interchange partner was rubber-stamped on the bill (Tr. 61, 548; see p. 60a, *infra*). Published tariffs relating to such shipments were amended to show use of the interchange, the interchange partners submitting jointly signed notices to the tariff publishers.[5]

Strickland's interest in acquiring the Monroe-New Orleans route[6] arose from the fact that Strickland was then scheduled to reacquire from a lessee—as it has now in fact reacquired—its own operating rights from Little Rock to Monroe. Use of the Monroe-New Orleans route provides an additional mileage saving on traffic between New Orleans and Midwest and Northeast points. During the time—1961 to 1964—that Strickland was interchanging equipment with England over Shreveport, England was

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[5] Samples are attached as Appendix F (pp. 51a-52a, *infra*). Thus, except for the fact that, of course, two motor carriers rather than a motor carrier and a rail carrier were involved, the interchange arrangement precisely paralleled the pattern of Plan I Joint Intermodal TOFC arrangements approved by the Commission in 1964 and by this Court on judicial review in 1967. See n. 4, pp. 7-8, *supra*.

[6] The Monroe-New Orleans rights were offered at England's auction only as a "package" with the Shreveport rights.

conducting other operations between Monroe and New Orleans.

The Proceedings Before the Commission.—The Application.—When England ceased operations on May 1, 1964, and placed its equipment and operating rights for sale at public auction on June 17, 1964, Strickland was the high bidder with respect to the Shreveport and Monroe routes, having outbid several competitors—none of whom provide a direct service to the Northeast—who have since become protestants in the present proceeding. Pursuant to Section 5 of the Interstate Commerce Act, Strickland and England jointly applied for Commission approval of the purchase, Docket No. MC-F-8798. Strickland and England also filed a related application to convert the New Orleans-Shreveport route to regular authority,[7] Docket No. MC-59680 (Sub—No. 142), contingent on approval of the purchase application. On September 30, 1964, the Commission authorized Strickland to begin temporary operations over the Shreveport-New Orleans route pending decision upon its application, and on February 5, 1965, authorized temporary operations over the Monroe route. Since October 5, 1964, Strickland under this temporary authority has continuously conducted operations over the routes in question, making rental payments to England in the amount of $7,425 per month, which payments are

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[7] A "regular" route is one restricted to specified highways or between fixed terminals, whereas "irregular" authority permits off-route service in a designated area. Section 207, 49 U.S.C. § 307, governs applications to convert irregular into regular authority, and Strickland proceeded thereunder with respect to the Shreveport-New Orleans route.

The Commission summarily denied the application to convert the New Orleans-Shreveport route when it denied the purchase application upon which the former was contingent. Strickland did not apply for conversion of the Monroe-New Orleans route.* Accordingly, there is no issue currently presented in this case as to whether there exists the public convenience and necessity to be shown for the conversion of an irregular route authority into a regular route authority.

to be credited against the purchase price of $495,000 in the event of final approval.

Extensive public hearings were held before the Commission's Examiner during 1965 relating to the Strickland purchases. The case was tried under the customary rubric in Section 5 motor carrier rights transfer cases that where the rights to be transferred are in active use and not "dormant" in the period prior to the application for their transfer, no new showing of public convenience and necessity for the operation of the route by the transferee need be made. See, *e.g., G & H Transportation Co.* v. *United States,* 249 F. Supp. 97, 99-100 (N.D. Tex. 1965); *Braswell Motor Freight Lines, Inc.* v. *United States,* 275 F. Supp. 98 (W.D. Tex. 1967), *aff'd,* 389 U.S. 569 (1968). On May 16, 1966, the Examiner issued a carefully documented Report and Recommended Order recommending approval of Strickland's application.[8]

The Examiner's Report.—The Examiner rejected the protests of various competing carriers that the routes in question had become dormant in fact, or were to be deemed constructively dormant on the theory that the interchange agreement between England and Strickland amounted to an unlawful pooling of traffic or revenues in violation of Section 5(1) of the Interstate Commerce Act.[9] In rejecting the charge of unlawful pooling, the Examiner noted that of the 13 protesting motor common carriers:

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[8] In their brief to the District Court, the United States and the Commission conceded (p. 26) that "The Examiner's findings of fact and summaries are complete and accurate."

[9] The attack on the interchange as an unlawful pooling was made on the theory that since Strickland could have moved the traffic to New Orleans itself without interchange, via its circuitous route through Texas, the arrangement was an unlawful contract between competitors pooling their traffic. Ex. Rep. 14-17.

> "[M]any ... undoubtedly similarly (albeit unwittingly) participate in essentially similar arrangements and thus the pooling of traffic, revenues and services to some extent when conducting their own operations. It would be virtually impossible for them to conduct an efficient and economical motor carrier service without being able to surrender to local carriers shipments moving in line-haul service to points around their terminal points which they are also authorized to serve. Whether the protesting carrier is a long-line carrier or a local or distributing carrier, the practice is economical for the one and beneficial to the other. In fact, many distributing carriers depend heavily upon such traffic." Ex. Rep. 17.

The Examiner accordingly recommended approval of the acquisition by Strickland of the England New Orleans-Shreveport rights.

With respect to Strickland's application for approval of its purchases of England's irregular authority between New Orleans and Monroe, the Examiner found that England

> "... had an established service. ... England operated daily between New Orleans and Shreveport and also between New Orleans and Monroe. . . . Between New Orleans and Monroe it operated at least one vehicle regularly loading it at New Orleans during the day and running overnight to Monroe, but more often had two units in this service dispatching one in each direction each night." Ex. Rep. 21.

However, in the course of recommending approval of Strickland's acquisition of England's irregular New Or-

leans-Monroe route, the Examiner, on his own initiative and not in response to any application by Strickland,[10] concluded that the irregular authority which Strickland had purchased should be converted to regular authority, subject to certain operating restrictions.[11]

The Commission's Action.—On July 31, 1967, by a six-to-four vote, the Commission reversed its Examiner. As the Examiner had done, the Commission majority flatly rejected the grounds upon which the protestants challenged the Strickland purchases. It held that a brief lapse in service in 1964 and the circumstances of England's ceasing operations did not establish "actual dormancy." 104 M.C.C., at 314 (p. 25a, *infra*).

The Commission then turned to the question whether the Shreveport-New Orleans route should be deemed constructively dormant. Once again, it rejected the position of the protestants that the arrangement was an unlawful pooling under Section 5(1). Said the majority:

> "Protestants urge that the arrangement was either an unlawful pooling of traffic and services or an unlawful control by Strickland of the operations of England (La.). We do not agree that the arrangement was either of these things." 104 M.C.C., at 315 (p. 26a, *infra*).

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[10] While an application to convert the Shreveport-New Orleans rights to regular route authority had been filed, no such application had been filed as to the Monroe-New Orleans rights.

[11] For his action, the Examiner cited recent precedent. ***Deaton Truck Lines, Inc.—Purchase—Lavendar,*** 97 M.C.C. 256 (1964), ***aff'd, Alabama Highway Express, Inc.*** v. ***United States,*** 241 F. Supp. 290 (N.D. Ala. 1965), ***aff'd,*** 382 U.S. 106 (1965). The case, however, simply holds that the Commission may condition the grant of a § 5 transfer application on a conversion of irregular route authority to regular..

Despite this, the majority concluded that the movement of Strickland trailers by England over its routes between Shreveport and New Orleans was "unlawful." The Commission suggested that the Strickland-England interchange had failed somehow to comply with the Lease and Interchange of Vehicles Rules, now 49 C.F.R. Part 1057. The precise basis for the majority's conclusion is not clear; the only specific citation to a rule of the Commission allegedly violated by the interchange was to a provision of Section 1057.5(c) (then Section 307.5(c)) of the Rules which requires that "the rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates." 104 M.C.C., at 316 (p. 27a, *infra;* see p. 49a, *infra*).

In addition, in the course of the Commission's discussion of the claimed illegality, the following matters were mentioned: (1) that England and Strickland "have not offered [in evidence] lease agreements covering such of Strickland's trailers as were used"; (2) that England was paid a flat charge per movement without regard to the weight or to the identity of the owner of the trailer; (3) that England "had no liability to the actual shippers"; (4) that England did not exercise "control or responsibility over the traffic"; (5) that most of the trailers involved in the interchange were owned by Strickland; (6) that England "cut no bills on the individual shipments nor was it shown as a connecting carrier on Strickland's bills, except that some of the bills issued by Strickland on shipments transported in this manner bore a rubber stamp

to show the routing." 104 M.C.C., at 315-16 (pp. 26a-27a, *infra*).[12]

The heart of the Commission's decision is at 104 M.C.C., at 317 (p. 28a, *infra*), where the majority said:

> "Whether this be pooling, interchange, or constructive control or lease by Strickland of the England (La.) rights, it was not authorized, not in compliance with our rules and regulations, and not lawful . . . . Appli-

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[12] While the Commission's decision to reject the transfer of the Shreveport operating rights is clearly based on its conclusion of the illegality of the Strickland-England interchange, its report also in passing discusses certain allegedly unlawful cross-hauling by England during the period in question. 104 M.C.C., at 317; p. 28a, *infra*. The cross-hauling consisted of England's alleged use of its radial authority contained in a single certificate covering the movement of goods between various points and New Orleans, to move goods via New Orleans between the points outside through the base-point New Orleans. The Commission rejected the Examiner's conclusion that to the extent England had engaged in "cross-hauling," it was justified in doing so in reliance upon a letter dated September 2, 1961, from an official of the Commission's New Orleans field office which England construed as approving the particular traffic patterns involved.

The Commission conceded that it had frequently approved § 5 transfer applications despite "unlawful prior operations of vendor" where the vendee had not committed the violations, where there was color of right, where there was a public need for lawful future operations, or where all of these elements were present. A stricter view would, of course, result in the destruction of operating rights previously found to be required by the public convenience and necessity. In the present case the Hearing Examiner had held after examining the vendor's personnel that they had acted in reliance upon a letter from the Commission's local supervisor; the Commission knew of the practice, on relation of a competitor, but had taken no action; and the amount of cross-hauling was "small and insignificant." (Ex. Rep. 23) The record abundantly documents Strickland's extreme care to avoid cross-hauling. See Tr. 368-82, 502-04, 535-36.

While the Commission apparently placed some indeterminate weight upon the cross-hauling, it is clear that the focus of its rejection of the Shreveport application was its conclusion as to the illegality of the interchange. See 104 M.C.C., at 314-17,

cants admit that the arrangement described was novel. Such admission coupled with their failure to ascertain, even if they did not prove, the lawfulness thereof, adds an element of wilfulness. Such a conclusion is particularly significant since a previous effort by Strickland to find a short way to move traffic from the midwest to New Orleans had been found unlawful in the *Gordons-Strickland* complaint case. There (*sic*) speculative use of another 'novel' arrangement after that experience borders on foolhardiness." [13]

With respect to the Monroe-New Orleans route, the Commission majority concluded that England's operations over this route did not suffice to establish substantial use of the authority by England sufficient to support the transfer.

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pp. 25a-28a, *infra*. If it erred in this conclusion, its orders cannot stand. Strickland is entitled to a decision by the Commission free of the effects of this error of law. See, *e.g.*, *Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

[13] As will be explained below, not only does the Commission in its key statement of position incorrectly conclude that the interchange arrangement was an unlawful one, and not only does it improperly penalize Strickland for its participation in a railroad-motor carrier piggyback arrangement which four Commissioners at the time thought lawful and which was in principle later upheld by the Commission in *Ex Parte 230*, 322 I.C.C. 301 (1964), but the very premise of the Commission's statement—that Strickland knowingly employed a "novel" arrangement to solve its circuity problem—is erroneous as a matter of fact. As an examination of the record will reveal, no witness sponsored by Strickland so characterized the interchange arrangement, nor has Strickland so characterized the arrangement in any document filed in the administrative or judicial proceedings. The majority seems to have attributed to Strickland the characterization of "novel" which the *Examiner*, not Strickland, used at page 18 of his Report. We note that the Examiner's use of the word—which we believe to be inexact—must be read in light of his belief that the arrangement was entirely lawful and his understanding that many of the protestant carriers were engaged in the same practices (Ex. Rep. 17, p. 13, *supra*), which would seem to negate novelty.

For this conclusion the Commission cited two related reasons. First, there was the Examiner's unsolicited conversion of the irregular route authority at issue into a regular route authority, which act the Commission concluded deprived the protestants of an opportunity to object. Second, the Commission held that the grant of a transfer of *regular* route authority over this route would

> "... create a service which is so vastly different from the simple peddle service provided by England out of New Orleans that an entirely new and different service would be created, which could not but have an adverse effect on the existing competitive situation." 104 M.C.C., at 319 (p. 30a, *infra*).

The Commission never addressed itself to the actual application of the parties—namely, that England's *irregular* route authority to Monroe be transferred to Strickland.

The four dissenters, including then Chairman Tucker and present Chairman Brown, disagreed with the entire result reached by the majority, observing that

> "These cases are being decided, at least to a great extent, upon technicalities or issues not raised by the parties."

The dissenters noted that although the majority in rejecting the Shreveport application "relied heavily" upon its interpretation of Section 1057.5(c) (then 307.5(c)) of the Lease and Interchange Rules, which requires that "charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates," the majority had given "no thought" to Section 1057.5(a) (then 307.5(a)) of those same Rules, which provides that "the use to be made

of the equipment and the consideration for such use" shall be set forth in the interchange agreement. The dissenters noted that while the majority had "condemned" the applicants for failure to produce the "lease" agreement, "the fact of the matter is that no one asked them to do so." 104 M.C.C., at 327, p. 38a, *infra*.

Following announcement of the Commission's decision, Strickland filed a "Petition for Reconsideration and Oral Argument and to Reopen to Receive Tendered Evidence." Strickland there sought to correct some of the factual misconceptions which arose from the Commission's having decided the case on issues not raised before the Hearing Examiner. First, Strickland proffered copies of the trailer interchange contract and other documents which governed the interchange and which the majority unwarrantedly assumed did not exist.[14] (Pet. Recon. 10-11, Apps. 1, 5-48) Second, it was demonstrated that the record was replete with documents showing that where England participated in traffic via the Shreveport interchange, that fact was stamped on the waybill. Third, the identity of the person who had characterized the interchange as "novel" was clarified. And fourth, the majority's unwarranted assumption that England did not participate in claims arising out of the traffic was corrected; Strickland demonstrated that it had a contractual obligation to indemnify England for such claims, a common industry practice, approved by the Commission. On March 14, 1968, Strickland's Petition was denied.[15]

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[14] The contract and certain documents setting forth interchange operating procedures are attached as Appendix G (pp. 53a-61a).

[15] The Commission did take the trouble to correct its opinion to reflect the fact that in the *American Trucking Ass'ns* case, 387 U.S. 397, decided on May 29, 1967, this Court had sustained—not struck down, as the Commission's report originally had it—the Commission's eventual approval of the kind of piggyback arrange-

The Proceedings in the District Court.—Pending disposition of Strickland's complaint in the District Court, its temporary authority to operate the routes in question was continued by that court. On December 2, 1968, the court entered a judgment sustaining the majority of the Commission. In a short *per curiam* decision, the court stated that in a Section 5 proceeding it could not penetrate behind "the wisdom and experience of the Commission" in ascertaining whether the transaction in question was "consistent with the public interest." The court held —and this is the sum total of its discussion or analysis of the issues in this case—that

> "The record of the proceedings establishes that the Commission's orders were based on substantial evidence and according to the applicable law. Plaintiffs in effect are asking this court to direct the Commission to be more lenient in its disposition, a position advanced by the four dissenting Commissioners. The case does not permit the court to be so motivated even if it were so disposed." (293 F. Supp., at 862; p. 5a, *infra*).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Strickland finds itself in an extraordinary predicament, the implications of which fully warrant plenary consideration by this Court. Having contracted to purchase England's Shreveport-New Orleans and Monroe-New Orleans operating rights, and having submitted the transaction for

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ment which Strickland had initiated with the Illinois Central. Whether the author of the majority Report was led into error by this gross misconception as to the results of this Court's review of the piggyback rules, we do not know.

approval under Section 5, Strickland successfully repelled every challenge made to the transaction by protesting carriers in public hearings spread over 4,111 pages of transcript. The evidence and legal arguments there adduced convinced an able and experienced Hearing Examiner that the routes in question were not dormant prior to their purchase, and that these routes should not be deemed constructively dormant as having been operated in an unlawful pooling arrangement in violation of Section 5(1) of the Interstate Commerce Act. The protesting carriers advanced the same objections before the full Commission, and with no more success.

But without warning and without affording Strickland any opportunity to respond to the new legal issues or to clarify the factual matters which the Commission suddenly and unexpectedly had decreed to be relevant, a slim majority of the Commission, over the dissents of its then Chairman, its present Chairman, and two other members, ruled that the trailer-for-trailer interchange which Strickland and England had operated for nearly three years was in some not-clearly-defined way "unlawful."[1] The majority ignored the fact that in formal rule-making proceedings it had approved many of the practices now condemned. It also ignored the fact that the arrangement precisely paralleled the analogous pattern approved by the Commission and this Court for Plan I joint intermodal

[1] That lawfully interchanged or interlined traffic suffices to establish nondormancy in a § 5 proceeding to unify the rights into single-line service is not disputable, and was not disputed by the Commission here. See, *e.g.*, *Alabama Highway Express, Inc.* v. *United States*, 241 F. Supp. 290, 292-94 and n. 6, and 295 n. 11 (N.D. Ala. 1965), *aff'g Deaton Truck Lines, Inc.—Purchase—Lavendar*, 97 M.C.C. 256 (1964), *aff'd*, 382 U.S. 106 (1965), and cases there cited by the District Court; see also *Midwest Emery Freight System, Inc.* v. *United States*, 293 F. Supp. 403, 405-07 (N.D. Ill. 1968).

piggyback service—shipment of loaded trailers on flatcars under motor carrier tariff on through bills of the motor carrier, which does all the billing and compensates the railroad on a basis negotiated between the parties and which need not be published or even filed with the Commission. The majority apparently condemned the interchange on a number of grounds; but none of these apparent grounds has any basis in law or fact. Neither can any of these grounds be explained by reference to the policies underlying Commission regulation in this area;[2] indeed, the Commission pointed to no policy basis for its decision.

Moreover, the Commission sought to shore up its highly questionable conclusion with respect to the interchange by characterizing Strickland as a willful violator, guilty of a foolhardy disregard for the risks involved. Here, the majority relied on Strickland's prior application for permission to control England, which permission had been denied on grounds not relevant to the present proceeding; its Plan III piggyback service with the Illinois Central, which had been invalidated by a slim majority of the Commission (and before the Commission itself approved Plan III service generally); and Strickland's alleged but nonexistent concession as to the "novelty" of its interchange arrangement.

With respect to the irregular Monroe-New Orleans route whose purchase Strickland had submitted for approval, the Commission majority escalated the Hearing Examiner's unsolicited recommended conversion of that route into regular authority—which conversion the majority found to be improper—into a conclusion that that

[2] See *Ex parte No. MC-43, Lease and Interchange of Motor Vehicles,* 52 M.C.C. 675 (1951), *modifying* 51 M.C.C. 461 (1950), promulgating and explaining the rules governing interchanges.

regular authority (which Strickland had never sought) would constitute a "new" service as to which a showing of public convenience and necessity would have to be made. Lost in the shuffle was the clear evidence of record and the Examiner's unequivocal finding that England had validly and actively exercised its operating rights over this irregular route until it ceased all operations in 1964. (See Ex. Rep. 21, p. 13, *supra.*)

Strickland's prompt and vigorous efforts to correct the erroneous factual and legal premises underlying the majority's position were summarily rejected. Strickland was not even allowed to provide the Commission with a copy of the interchange agreement which it pleased the majority to assume did not exist, or to call the majority's attention to the thousands of through bills referred to in the record bearing designation of England's participation in the traffic routed over the Shreveport interchange, or to point out that it was the Examiner and not Strickland who had described the interchange as "novel."

Notwithstanding the favorable Examiner's Report, the sharp division within the Commission itself, and the unusually arbitrary and capricious nature of the majority's result, the District Court in a brief *per curiam* opinion merely recited the statutory scheme, listed the various conclusions of the Commission majority, and disposed both of Strickland's case, and of Copperstate's entirely different case, thus:

> "The record of the proceedings establishes that the Commission's orders were based on substantial evidence and according to the applicable law. Plaintiffs in effect are asking this court to direct the Commission to be more lenient in its disposition, a position ad-

vanced by the four dissenting commissioners. The case does not permit the court to be so motivated even if it were so disposed." (293 F. Supp., at 862; p. 5a, *infra*).

Strickland's timely request that the court make specific findings with respect to such key issues as the legality of the interchange was summarily denied.

Apart from the intolerable procedural predicament to which Strickland has been subjected by the Commission's unexpected attack on the legality of the interchange, and its indefensible use of the Examiner's unsolicited conversion of the New Orleans-Monroe authority into "regular" route authority as a basis for denying the application to transfer that authority, this case presents important questions of substantive law affecting the entire industry which should be resolved by this Court after plenary consideration. These issues relate to the legality of the New Orleans-Shreveport interchange—an interchange operated in complete conformity with the Commission's rules, in conformity with interchange principles established by the Commission in other cases, and, indeed, in many of the questioned respects in what appears to be the only practical manner in which to operate a motor carrier interchange.

I. *The Shreveport-New Orleans Rights and the Legality of the Interchange*

The key to the majority's disapproval of Strickland's acquisition of England's Shreveport-New Orleans operating rights was its conclusion that the route was constructively dormant between 1961 and 1964, in that the inter-

hange conducted during that period "was not authorized,[3] ot in compliance with our rules and regulations, and not awful." 104 M.C.C., at 317 (p. 28a, *infra*). With respect o the majority's repeated assertion that the Strickland-England arrangement "does not constitute interchange ithin the meaning of our rulings," [5] we note that the efinition of "interchange" advanced by the majority two entences later precisely describes the Strickland-England nterchange operation. There, the majority states that:

> ". . . interchange is a kind of interline [previously defined as the "practice whereby a carrier transfers a *shipment* to another carrier at a point of joint service for delivery or for further movement and later interline with another carrier"] which involves the exchange of equipment, here trailers but often tractors and trailers with or without drivers. Compare *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 121. Usually interchange involves loaded vehicles, but in any form it is governed by the *Lease and Interchange of Vehicles Rules,* 49 CFR 307." (104 M.C.C., at 316; p. 27a, *infra*)

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[3] The Commission's Rules do not impose any requirement that he Commission "authorize" specific motor carrier interchanges; his is a matter of private agreement.

[4] As developed in n. 12, pp. 16-17, *supra,* the Commission's iscussion of England's cross-hauling does not constitute an alterative basis for its decision capable of supporting it if its legal onclusion as to the lawfulness of the interchange is struck down.

[5] 104 M.C.C., at 316 (p. 27a, *infra*). Needless to say, the majority never attempted to identify the alleged rulings referred o, and it failed to cite *Ex parte No. MC-43, supra,* where the nterchange rules were promulgated and explained. As is noted elow, the Commission's opinion in *Ex parte No. MC-43* expressly nctioned many of the practices which the majority in the present se assumed without justification were "unlawful."

In *Gilbertville,* this Court defined interchange as a

> "... form of interlining whereby the two interlining carriers switch trailers at the point of transfer. An interchange is most common where the shipment involves a truckload quantity, and the exchange of trailers obviates the necessity of unloading the shipment from the trailer of the transferor and loading it on the trailer of the transferee. The trailer taken in exchange for the shipment-trailer may be either empty or loaded with an interline shipment in the other direction. A further form of interlining involves the use of a trip-lease for the transferee's leg of the journey. There the shipment-trailer is taken by the transferee, but no trailer is given in exchange; instead the transferor will lease the shipment-trailer to the transferee for the completion of the trip." 371 U.S., at 121 n. 2.

And the Commission's own Rules, 49 C.F.R. § 1057.2(c), p. 48a, *infra,* define an interchange of equipment as

> "The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve."

How these definitions exclude the Strickland-England arrangement is, to say the least, unclear.

Nor is the Commission's crucial but indefensible conclusion as to the alleged illegality of the interchange strengthened by its apparently critical enumeration of the alleged incidents of the arrangement. To consider them, one by one:

1. *The suggested absence of lease agreements.*—The majority attempted to make much of the fact that Strickland and England "have not offered lease agreements covering such of Strickland's trailers as were used." 104 M.C.C., at 316, p. 27a, *infra*. As the four dissenters noted, the applicants had never been asked to produce such a document, and in light of the issues before the Examiner, the question had never arisen. Moreover, promptly upon service of the Commission's Report, Strickland proffered a copy of the interchange agreement to the Commission, which declined to receive it. A copy of the document for whose alleged nonexistence the dissenters suggest Strickland was "condemned" is appended hereto in Appendix G, at pp. 53a-56a, *infra*. We note in passing that the Commission has never required the filing of such agreements with it. Indeed, at the urging of the Bureau of Motor Carriers, the Commission deleted from the leasing and interchange rules a proposed filing requirement. See *Ex parte No. MC-43, supra*, 51 M.C.C., at 527.

2. *The alleged improper basis of compensation between the carriers.*—The only alleged incident of the interchange which the majority even attempted to relate to any law, decision or regulation, and the only one explicitly declared to be sufficient to invalidate the interchange, was the agreement of the parties that England was to be compensated for its participation in the interchange traffic by a flat fee per trailer, which did not vary with the weight of the trailer or the identity of its owner. The majority suggested that this somehow violated Rule 307.5(c) (now 1057.5(c)).[6] As the four dissenters noted, this position overlooks Rule 307.5(a) (now 1057.5(a)), p. 48a, *infra*, which simply pro-

[6] Which provides that "charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates." (p. 49a, *infra*)

vides that the "contract, lease, or other arrangement providing for interchange" shall describe the "use to be made of the equipment, and the consideration for such use." To some extent, the Commission majority also seems to suggest that there was a procedural deficiency in the basis on which the payments between the carriers were to be made, in that separate charges should have been established (a) for the rental of equipment, and (b) with respect to the division of the revenues for moving the freight.

In the Strickland-England arrangement, the consideration for the use of the interchanged equipment was fixed as the furnishing of a substitute trailer which the party giving up the first trailer in the interchange would then have a right to use. (See p. 55a, *infra*) The arrangement between the interchange participants was that whenever one party surrendered a trailer into the possession of the other, the receiving party was required to surrender into the possession of the first carrier a substitute trailer which that carrier would have a right to use.

The provision of the rules relied on by the majority on its face applies only when there is to be a debit or credit equipment position, requiring monetary compensation for the equipment use—as in the "trip-lease" procedure discussed by this Court in *Gilbertville*. (See p. 26, *supra*) Where there is such monetary compensation, it is to be separately stated from the agreed division of freight revenues. But here there was to be no equipment debit or credit position. No provision of law requires the transfer of possession of interchange equipment to be compensated for on a monetary basis. Indeed, in the passage from *Gilbertville* quoted above (p. 26), this Court recognized the "trailer-for-trailer" exchange procedure as an alternative to a trailer lease. The compensation here was the surrender of another trailer, so that each party possessed its

original number of trailers at all times. Since there was no money "charge for the use of the equipment," there was nothing to "keep separate" from the "divisions of the joint rates." Or, to put it another way, the consideration for the use of the trailer equipment—exchange of another trailer—was in fact separately stated from the "division of the joint rates" ($125, later $160 per movement). No provision of the interchange rules speaks to the question of the consideration to be exacted, either for use of equipment or for participation in carrying traffic.

As to the Commission's apparent strictures on the flat fee per movement basis of payment to England as compensation for its movement of the freight, it should be noted that in promulgating the rules in 1951, the Commission declined to prescribe a mode of compensation, except that it *prohibited* basing compensation on a percentage division of revenues. 52 M.C.C., at 722, 726. The earlier Division 5 opinion had sharply *criticized* using tonnage as a basis. 51 M.C.C., at 528. The Commission's present suggestion that a flat per-movement fee for the division was improper and that a percentage division would be preferable, or that the tonnage in the trailers should be determinative, is, accordingly, surprising. Moreover, we note here that in *Ex Parte 230, supra,* 322 I.C.C., at 328, 350-51, 375, the Commission explicitly held that divisions of rates involving carriers[7] are matters of private contract, and it declined to place any limitation or impose any particular

[7] Other than divisions purely between rail carriers, which are obligatory and governed by statute. 49 U.S.C. §§1(4), 15. In an all-rail situation, rail carriers are, by the cited provision, statutorily required to establish through routes and rates and to establish just and equitable divisions between themselves. There is no similar provision of the statute requiring interchange between motor carriers or between motor carriers and rail carriers; when such interchanges are effected on a voluntary basis, the divisions are a matter of negotiation between the participants.

form upon them—such as the Commission's unprecedented suggestion here that the fee must vary with weight and ownership—or to require that they be filed. Finally, the rules and regulations of the National Motor Equipment Interchange Association, agreement as to which was approved by the Commission in *National Motor Equipment Interchange—Agreement,* 305 I.C.C. 196 (1958), contain no such requirement, and indeed contemplate charges unrelated to weight or ownership.

3. *The ownership of the trailers.*—No more useful is the majority's suggestion that the interchange here was somehow faulty, in that most of the trailers interchanged were "owned" by Strickland, and that England's own trailers were absorbed into the flow of interchanged trailers. Here, the majority is unable even to refer to any statute, regulation or decision to justify its view that an interchange partner can only surrender his own trailers and must "own" half of all of them in service. The fact is that none of the Commission's own regulations, and none of its decisions or those of the courts, impose any such requirement. On the contrary, in promulgating its rules, the Commission in 1951 expressly *rejected* its Examiner's proposal that interchange agreements be confined to "owners" of the equipment involved, noting that in many instances the equipment might even belong to a third party. It was enough, indicated the Commission, that the interchange partner have "legal possession." *Ex Parte No. MC-43, supra,* 52 M.C.C., at 720-21. Compare proposed Rule IVa, 52 M.C.C., at 735, with the rules as promulgated.

Here, the parties' arrangement was that wherever Strickland gave up a trailer into England's possession, England gave one up into Strickland's possession. The trailers so given up were trailers in the lawful possession

of the party giving them up and which the recipient would have a right to use. Thus, for example, if England at the start of the arrangement had 25 trailers and Strickland 100, at all times thereafter, England would have 25 trailers and Strickland 100. Naturally, because of the disparity in size between the participants, the trailers being exchanged, as a statistical matter, in the majority of cases once the interchange began operating, would be trailers to which Strickland had title.

The apparent suggestion of the majority that trailer exchanges should be effected only as between a trailer *owned* by the first party, on the one hand, and *owned* by the second party, on the other, not only contradicts the position taken on the promulgation of the rules, but is plainly unworkable. In the first place, no two participants in an interchange are likely to have identical numbers of trailers; but unless this were the case, it would be difficult to comply with the Commission's new apparent requirement. In the second place, even if the two participants had approximately equal numbers of trailers to start with, a long-line carrier like Strickland would, in the nature of things, quickly absorb all of the equipment of a short-haul carrier like England, and before the short-haul carrier's equipment would return from distant destinations, all of the trailers being exchanged would be the long-line carrier's. We assume that the Commission does not intend to bar interchanges between partners of different sizes, or between those whose routes are unequal in size. Yet such is the import of its position, unless, as appears, it is simply an impermissible *ad hoc* declaration of illegality as to the parties here.

4. *The erroneous assumptions as to the through bills.* The majority's belief that only "some" of Strickland's through bills bore indicia of England's participation, and

that in any event the arrangement was somehow unlawful because England failed to cut bills itself respecting the interchange, is simply mistaken. Copies of all of the through bills issued in connection with the interchange were made available at the hearing, and the record, by review of the bills and lengthy cross-examination, is clear that virtually all of such bills had been stamped to indicate England's participation. (Tr. 59-61, 494-95, 561-63) As explained above (Statement, p. 10; see also p. 60a, *infra*), the stamp was applied only when it was once ascertained that the shipment would in fact be carried over the interchange. On southbound shipments, this decision was normally made at Little Rock. On shipments not routed over the interchange, no stamp was applied. Moreover, where England was itself the originating carrier and dealt directly with the shipper, it did cut its own bills. The record well may contain copies of a few bills on interchanged shipments which bear no stamp. But these bills must be stamped by hand, in nine copies; it would be incredible were there not some human errors.

In any event, the majority's contention that the non-originating carrier in an interchange must cut its own bills (even though it has no direct contact with the shipper, who may be thousands of miles away and has already paid the originating carrier for the total shipment) has no basis in law. Indeed, the only regulation cited by the majority in connection with the interchange, 49 C.F.R. §1057.5(c), expressly requires that

> "The traffic transported in interchange service *must move on through bills of lading issued by the originating carrier. . . .*" (Emphasis supplied)

This is precisely what was done here. The Commission's rules with respect to Plan I joint intermodal piggyback service, the piggyback equivalent and "carbon copy" of the Strickland-England interchange, have an identical provision. Moreover, in *Ex parte 230, supra,* 322 I.C.C., at 359, the Commission held that, absent an express shipper's direction, the originating carrier need not make its decision whether to use an interchange at the time of receipt of the shipment but may do so later, as did Strickland here at its break-bulk terminal at Little Rock.

5. *The alleged nonliability of England to shippers.*— The assertion that the interchange was unlawful because England allegedly "had no liability to actual shippers" is so far out of accord with the statute and the Commission's own rulings in this area as in itself to raise questions about the soundness of its decisional process here. No arrangement between the parties could discharge either of them from their statutory duties to the public; and none purported to do so.

What the parties agreed here was that Strickland would indemnify England with respect to any shipper claims arising out of England's operations under the interchange. The practice of one interchange participant indemnifying another is one common in the industry and one whose validity has been recognized by the Commission. *Ex parte 230, supra,* 322 I.C.C., at 347; *National Motor Equipment Interchange—Agreement, supra,* 350 I.C.C., at 200. Moreover, since England was essentially a "bridge" carrier and the traffic moved over England's routes in sealed trailers, the practicalities of the matter were that if any damage were done to the shipments, it was in point of fact Strickland's responsibility, since it assembled and de-

livered the shipments. The indemnification agreement thus simply reflected the practicalities of the matter and made Strickland responsible to assume the adjustment and defense of claims.

6. *The alleged failure of England to control the traffic.* —Finally, with respect to the claim that England somehow failed to exercise "control or responsibility" over the interchanged traffic, it is impossible to see how England's role differed from that of any other "bridge" carrier in an interchange. Its role was to check the equipment received to insure that it complied with the agreement, and to carry the trailer from one point to another over its routes, delivering it in good condition. England utilized its own tractors, drivers, safety inspectors and office personnel; it maintained and operated its own tractor terminals; all of its employees were solely responsible to it; and its drivers transported the interchanged trailers solely over its own certificated routes. There is nothing else a bridge carrier could or should do. The Commission has made no suggestion as to what else England should have done.

* * * * *

The majority's position—central to its rejection of the Shreveport-New Orleans application—that the interchange was unlawful is, accordingly, completely without basis in fact or law. Moreover, in a number of respects, it runs afoul of carefully considered positions taken by the Commission itself after elaborate rule-making procedures in 1950 and 1951, and is wholly inconsistent with the liberal purpose underlying the interchange rules.[8] The majority's

[8] In *Ex parte No. MC-43, supra,* 51 M.C.C., at 530, Division 5 noted its "belief that interchange between common carriers, in

contention that the interchange was unlawful reduces itself to little more than endless reiteration of a legal conclusion designed to reach a specific result; and that conclusion is without foundation. Since the Commission's decision turns on a question of law, it is judicially reviewable. Because of the grossly erroneous conclusion of the Commission, and the shadow it casts upon common motor carrier interchange practices formally approved by the Commission, plenary consideration by this Court would be indicated, even apart from the manifest procedural irregularities inflicted upon Strickland.

II. *The Monroe-New Orleans Rights*

Much less need be said at this point about the Commission's conclusion that although the Hearing Examiner erred in *sua sponte* converting the authority between Monroe and New Orleans into regular authority, it could not approve the purchase of such regular authority because it would create a new and different service as to which a public convenience and necessity must be shown. Strickland contracted to purchase irregular authority between Monroe and New Orleans and sought to have that purchase approved. To date, the Commission has not passed upon Strickland's application, choosing instead to reject purchase of the authority as converted—erroneously, it says—by the Examiner. Whether or not regular authority on this route would constitute a new service, the fact is that the record supports the Examiner's finding that the Monroe-New Orleans route was not dormant at the time

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order to promote through movement of traffic without unloading, where feasible should be encouraged." See also *Midwest Emery Freight System, Inc.* v. *United States*, 293 F. Supp. 403, 407 (N.D. Ill. 1968).

of the purchase, there is nothing in his Report or in that of the Commission to suggest that purchase of irregular, as opposed to regular, authority would create a new and different service, and, accordingly, Strickland is entitled to have its application approved.[1]

While the Commission's handling of the Monroe-New Orleans application does not present issues of the industry-wide significance which its declaration that the Shreveport-New Orleans interchange was unlawful does, the patent procedural irregularity of the Commission's action, sanctioned without critical examination by the District Court, should be reviewed by this Court on appeal, together with the other issues presented.

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[1] The Examiner ordered the England irregular route authority between New Orleans and Monroe converted to regular route authority as a condition upon approval of the Section 5 application, under the authority of *Alabama Highway Express, Inc.* v. *United States*, 241 F. Supp. 290 (N.D. Ala. 1965), *aff'g Deaton Truck Lines, Inc.—Purchase—Lavendar*, 97 M.C.C. 266 (1964), *aff'd*, 382 U.S. 106 (1965). That case indeed holds that incident to approving a Section 5 application the Commission may impose as a condition the conversion of certain of the authorities in question. However, no case upholds the Commission's action, once the Examiner has recommended such a condition upon approval, in denying approval of the application conditioned as recommended by the Examiner, while refusing to pass upon the application as actually filed. The difference is that in one case the Commission passes on the application as filed—and determines to grant it only subject to a condition—while in our case it has not passed upon it.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Order Affirming Decision of the Interstate Commerce Commission

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Civil No. 68-575-F
[Entered Dec. 2, 1968]

CONSOLIDATED COPPERSTATE LINES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

STRICKLAND TRANSPORTATION CO., INC.,
Plaintiff in Intervention.

Before BROWNING, *Circuit Judge,* and BYRNE and FERGUSON, *District Judges.*

PER CURIAM:

This is an action under 28 U.S.C. §§1336, 1398, 2284, 2321-2325 to annul and set aside orders of the Interstate Commerce Commission. The report and orders of the Commission, dated July 31, 1967, are published at 104 M.C.C. 297, and amended by order of March 4, 1968.

Primarily involved are the purchases of operating rights of two companies, England Transportation Company, a Louisiana corporation, and England Transportation Com-

pany of Texas, a Texas corporation. These two companies ceased operations in 1964 due to failure to consummate a new labor agreement, and they placed their operating authority and equipment for sale at public auction. The plaintiffs, Consolidated Copperstate Lines and Strickland Transportation Co., Inc., were two successful bidders.

The statutes involved are §§5(2)(a)(i), 5(2)(b), 207 and 210a(b) of the Interstate Commerce Act [49 U.S.C. §§5(2)(a)(i), 5(2)(b), 307 and 310a(b)].

Section 5(2)(a) provides the basic permissibility for carriers to acquire control of other carriers.

Section 5(2)(b) sets forth procedures and standards for Commission approval of such transactions.

Section 207 provides for the grant of a certificate authorizing common carrier operation upon suitable findings of the public convenience and necessity.

Section 210a(b) provides for the issuance of temporary authority for one motor carrier to operate or lease the rights of another carrier.

In its §5 purchase application, Copperstate sought to obtain through the purchase of a portion of the rights of England Transportation Company of Louisiana (England, La.), and England Transportation Company of Texas (England, Tex.), more direct routes from its western and southwestern service territory to points in Texas and to penetrate the New Orleans, Louisiana, service territory by providing service between New Orleans and Houston, Texas. Copperstate also filed an application for authority under §207 for an extension of the rights it sought to acquire.

By its §5 purchase application, Strickland sought to obtain through the purchase of England (La.) a competitive, direct north-south route between its present east

and northern service territory, on the one hand, and, on the other, New Orleans—from Texarkana, Texas, through Shreveport, Louisiana. Also, in a §207 application, Strickland sought to convert a portion of the England (La.) rights from irregular-route authority to regular-route authority.

Temporary authority to operate the rights of the England Companies was granted by the Commission in September 1964 and both Strickland and Copperstate commenced operation the following month.

Both Copperstate and Strickland sought approval before the Commission and were given temporary authority to operate under the England rights pending final order of the Commission. The hearing examiner recommended, generally, approval of the applications, but the Commission, with four dissenters, denied the applications. In reversing the examiner's recommendation, the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland, as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing

a need for the new services, and (7) that neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

Before the Commission's orders became effective, this action was filed. A temporary injunction and interlocutory judgment have stayed the effective date of the Commission's orders. We now conclude that the Commission's orders should be upheld.

In a §5 application proceeding, the burden is upon the applicant to show that a new service will not be created. The applicant must show both (1) that the prior operations were not dormant and (2) that the use to which the purchased rights would be put would not radically differ from their prior use. *Braswell Motor Freight Lines, Inc.* v. *United States,* 275 F. Supp. 98 (W.D. Tex. 1967), *aff'd per curiam,* 389 U. S. 569, *rehearing denied,* 390 U. S. 975 (1968).

If the Commission finds under a §5 proceeding that the rights to be purchased were dormant or a new competitive service created, or that the vendor was selling more rights than he had, then the applicant must present proof under a separate §207 application that the public convenience and necessity require the granting of the application.

The test of court review of the Commission's actions is the same in a §5 as in a §207 proceeding. In a §207 proceeding, the test is "It [the reviewing court] cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law". *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 536 (1946). In a

§5 proceeding "'the wisdom and experience of the Commission', not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest'. . . . If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order". *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944).

The plaintiffs' attack against the Commission's decision is bolstered by the fact that the hearing examiner and four of the commissioners would grant the applications. This circumstance, however, does not permit this court to vary from the established rules of judicial review.

The Commission considered all four applications in one report and order. As a result, the report, being one document, did not separate item by item the findings in regard to each application. This method of drafting its report certainly cannot be fatal to the Commission's orders. Form does not govern substance, and the Commission's findings in the §207 proceedings are fully applicable to the same issues in the §5 matters. A study of the Commission's report requires the conclusion that its discussion rationally segregates and disposes of all issues raised in each proceeding.

The record of the proceedings establishes that the Commission's orders were based on substantial evidence and according to the applicable law. Plaintiffs in effect are asking this court to direct the Commission to be more lenient in its disposition, a position advanced by the four dissenting commissioners. The case does not permit the court to be so motivated even if it were so disposed.

IT IS ORDERED that the decision of the Commission be, and the same is, affirmed.

APPENDIX B

Order Denying (1) Motion to Amend Findings and (2) Motions for Injunction Pending Appeal*

IN THE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil No. 68-575-F

[Entered Jan. 27, 1969]

CONSOLIDATED COPPERSTATE LINES,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

STRICKLAND TRANSPORTATION CO., INC.,

Plaintiff in Intervention.

Before:

BROWNING, *Circuit Judge,*
and BYRNE and FERGUSON, *District Judges.*

PER CURIAM:

The following motions having been duly submitted for decision pursuant to a Stipulation and Order filed December 30, 1968:

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* As corrected by order *nunc pro tunc* filed February 3, 1969.

(1) Motion of Consolidated Copperstate Lines, filed December 30, 1968, for an injunction pending appeal to stay the Orders of the Interstate Commerce Commission;

(2) motion of Strickland Transportation Co., Inc., filed December 11, 1968, to amend findings and make new findings; and

(3) motion of Strickland Transportation Co., Inc., filed December 30, 1968, for an injunction pending appeal,

IT IS ORDERED that the above-described motions are denied.

IT IS FURTHER ORDERED that the clerk this date serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.

APPENDIX C

Commission Report, Dissent, and Order

Served August 15, 1967

MF-3010

INTERSTATE COMMERCE COMMISSION

No. MC-F-8798[1]

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

Decided July 31, 1967

1. In No. MC-F-8798, purchase by Strickland Transportation Co., Inc., of certain of the operating rights of England Transportation Co., Inc., and acquisition by L. R. Strickland of control of the operating rights through the purchase, denied.
2. In No. MC-59680 (Sub-No. 142) public convenience and necessity found not shown to require operation by Strickland Transportation Co., Inc., as a motor common carrier, over a regular route, between Shreveport and New Orleans, La. Application denied.
3. In No. MC-F-8808, purchase by Consolidated Copperstate Lines of certain of the operating rights and property of England Transportation Co., Inc. and the operating rights of England Transportation Company of Texas, and acquisition by Horace W. Steele, Service Tank Lines, Cornel G. Allen, and Walter B. Allen of control of the operating rights and property through the purchase, denied.
4. In No. MC-22167 (Sub-No. 21) public convenience and necessity found not shown to require operation by Consolidated Copperstate Lines, as a motor common carrier, over a regular route, between Houston, Tex. and New Orleans, La. Application denied.

David Axelrod, W. T. Brunson, R. Douglas Coffin, and *Leonard R. Kofkin* for applicants.

M. Ward Bailey, Louis I. Dailey, Bob W. Fleming, Charles R. Ford, Jr., William F. Goodwin, Leroy Hallman, Rollo E. Kidwell, Charles D. Mathews, Hugh T. Matthews, Oscar P. Peck, Reagan Sayers, R. Y. Schureman, Mert Starnes, and *Phineas Stevens* for protestants.

A. R. Allen for intervenor

REPORT OF THE COMMISSION

[1]This report also embraces Nos. MC-59680 (Sub-No. 142), Strickland Transportation Co., Inc., Extension—New Orleans; MC-F-8808, Consolidated Copperstate Lines—Purchase (Portion)—England Transportation Co., Inc., and England Transportation Company of Texas; and MC-22167 (Sub-No. 21), Consolidated Copperstate Lines, Extension—New Orleans.

TUGGLE, *Commissioner:*

Exceptions were filed by certain protestants to the report and recommended order of the hearing examiner to which all applicants replied. Our conclusions differ from those of the examiner.

By joint application in No. MC-F-8798, filed July 1, 1964, Strickland Transportation Co., Inc., hereinafter called Strickland, of Dallas, Tex., and England Transportation Company, a Louisiana corporation, hereinafter called England (La.), of New New Orleans, La., seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of certain of the operating rights of the latter for $495,000. By the same application, L. R. Strickland, also of Dallas, who controls Strickland through ownership of a majority of its capital stock, seeks authority under the same section to acquire control of the said operating rights through the purchase.

By another application in No. MC-59680 (Sub-No. 142), filed December 7, 1964, as a matter directly related to the application in No. MC-F-8798, Strickland seeks authority under section 207 of the act to convert a portion of the operating rights sought to be acquired from irregular-route to regular-route operations, as hereinafter further explained.

By a second joint application, in No. MC-F-8808, filed July 7, 1964, Consolidated Copperstate Lines, a California corporation, hereinafter called Copperstate, of Montebello, Calif., England (La.), and England Transportation Company of Texas, a Texas corporation, hereinafter called England (Tex.), of Houston, Tex., seek authority under section 5 of the act for the purchase by Copperstate of certain of the operating rights and property of England (La.) and all of the operating rights of England (Tex.) for a total of $400,000. By the same application, Horace W. Steele, Service Tank Lines, Cornel G. Allen, and Walter B. Allen, all of Montebello, seek authority under the same section to acquire control of the operating rights through the purchase.

In another application in No. MC-22167 (Sub-No. 21), filed December 21, 1964, Copperstate seeks authority under section 207 of the act to operate, as a motor common carrier over regular routes, in the same area as a portion of the irregular-route operating rights to be acquired, as hereinafter further explained. Although the notice of the filing of this application in the Federal Register stated that it was directly related to the finance proceeding in No. MC-F-8808, this is only partially true, since a portion of the authority sought by Copperstate in its extension proceeding is new authority, and thus cannot be directly related. By order of November 18, 1966, under section 17 of the act, the entire matter in No. MC-22167 (Sub-No. 21) was assigned to division 3 for handling and determination on a con-

solidated record with the proceedings in Nos. MC-F-8978, MC-F-8808, and MC-59680 (Sub-No. 142). However, thereafter we recalled all of the proceedings from division 3. The publication also stated that the application was one to be determined under the special conversion rules as set forth in No. MC-C-4366, but this was later retracted. It is conceded by applicants that the application is one to be decided on the basis of public convenience and necessity.

Hearing has been held at which 14 motor carriers[2] and the Texas Railroad Association, representing the 11 railroads operating in Texas and the motor carrier subsidiaries of 2 of them, appeared, cross-examined applicants' witnesses, and certain of them introduced evidence. In addition, the Portland (Oreg.) Traffic Association intervened in support of the Copperstate applications. The findings of the hearing examiner with respect to the financial condition of applicants and, the history, organization, and operations of applicants and protestants are adopted as our own except to the extent they may be inconsistent with our findings. Applicants in each of the two purchase proceedings are motor common carriers in interstate or foreign commerce, and in each case they operate in excess of 20 motor vehicles in transportation subject to part II of the act.

Temporary Authority

Pursuant to orders entered September 30, 1964, in each of the two purchase proceedings, as amended by order of February 5, 1965 in No. MC-F-8798 and by orders of February 15, 1965 in Nos. MC-F-8798 and MC-F-8808, Strickland and Copperstate were authorized to lease the respective portions of the operating rights of England (La.) which they seek to acquire under those applications. Copperstate was also authorized to lease the motor carrier equipment of England (La.) and certain of the operating rights of England (Tex.). All lease rentals so paid would apply as partial payment of the purchase price in the event of approval. Temporary operations under these authorities were instituted by Strickland on October 5, 1964, and by Copperstate on October 28, 1964.

[2] *Group 1:* Braswell Motor Freight Lines, Inc. (Braswell), Gordon's Transports, Inc. (Gordons), East Texas Motor Freight Lines, Inc. (East Texas), Herrin Transportation Co. (Herrin), Red Ball Motor Freight, Inc. (Red Ball), and Saia Motor Freight Line, Inc. (Saia); *Group 2:* Campbell Sixty-Six Express, Inc. (Campbell), Arkansas-Best Freight System, Inc. (Arkansas-Best), and Delta Motor Line, Inc. (merged into Arkansas-Best on July 6, 1965 and hereinafter considered a part of that carrier); and *Group 3:* Brown Express, Inc. (Brown), Central Freight Lines, Inc. (Central), Western Gillette, Inc. (Western Gillette), Ryder Truck Lines, Inc. (Ryder), and Red Arrow Freight Lines, Inc. (Red Arrow). Carriers in group 1 are protestants to all four of the applications herein; those in group 2 are protestants only to Strickland applications; and those in group 3 are protestants only to the Copperstate applications. For convenience, protestants will hereinafter be referred to by the short names shown in parenthesis.

HISTORY AND OPERATIONS OF THE ENGLAND COMPANIES

England (La.).—This company was incorporated in 1942. In 1954 control passed into the hands of J. C. Hunter. In 1958 Strickland contracted with Hunter to purchase all of the stock of England (La.) for $175,000, which transaction was the subject of an application denied by this Commission in *Strickland Transp. Co., Inc.—Control—England Transp. Co.*, 85 M.C.C. 549, hereinafter called the prior *Strickland-England* case, based chiefly upon the fact that approval would create a new competitive service to the detriment of protestants therein and for which no need had been shown. Shortly thereafter, in July 1961, control of England (La.) passed to C. L. Callaway, a noncarrier individual and its present principal stockholder through a transfer of stock, a transaction which, standing by itself, was not subject to this Commission's jurisdiction. However, at about the same time Callaway also acquired control of England (Tex.), a situation discussed further hereinafter.

Under certificates issued in Nos. MC-57946 (Sub-Nos. 2 and 3) on May 18, 1950, and September 22, 1950, respectively, England (La.) was authorized to perform the following operations in interstate or foreign commerce:

No. MC-57946 (Sub-No. 2):

General commodities, except dangerous explosives, household goods, as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk, and those requiring special equipment, over irregular routes, from New Orleans and Plaquemine, La., to Baton Rouge and Thibodaux, La.; from New Orleans and Plaquemine, La., to Ponchatoula, Hammond, Kentwood, Amite and Clinton, La.; between New Orleans, La., and Plaquemine, La.

No. MC-57946 (Sub-No. 3):

General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, dangerous explosives, commodities in bulk, and commodities requiring special equipment, over irregular routes, between New Orleans, La., and points within 10 miles of the corporate limits of New Orleans, on the one hand, and on the other, points in Louisiana, except from New Orleans to Amite, Baton Rouge, Clinton, Hammond, Kentwood, Ponchatoula, and Thibodaux, La., and between New Orleans and Plaquemine, La.; and composition pipe, and connections and fittings therefor, over irregular routes, from Marrero, La., to points in Mississippi on and south of U. S. Highway 80.

Its authority to transport composition pipe from Marrero, La. to certain points in Mississippi was also sold to another party at the time of the purchase agreements herein. That transaction was approved in No. MC-F-8842, *Deaton Truck Lines, Inc.—Purchase—England Transp. Co., Inc.*, (not printed) decided June 4, 1965. Its authority to operate as an intrastate carrier in Louisiana was similarly sold.

England (Tex.).—Originally known as D. A. Beard Truck Lines, control of this carrier was acquired by Callaway in July 1961, and it was operated under that name until mid-1963 when its name was changed to England Transportation Company of Texas. On April 15, 1963, this Commission instituted an investigation under section 5(7) of the act in No. MC-F-8415, *Clarence L. Callaway—Investigation of Control—D. A. Beard Truck Lines Company and England Transportation Co.* to determine whether common control of the two carriers had been acquired unlawfully. Shortly thereafter, Callaway filed an application in No. MC-F-8563 seeking approval of the common control should it be found to be required. The two cases were heard on a consolidated record. The examiner found that common control had been effected in violation of section 5 of the act, but that the circumstances were mitigating. He recommended approval of the application in No. MC-F-8563 and discontinuance of the investigation in No. MC-F-8415, which recommendation was adopted by decision and order of the Commission on December 23, 1964.

England (Tex.) is authorized to operate in interstate or foreign commerce as a motor common carrier, over irregular routes, as follows:

No. MC-2960 (Sub-No. 1):

General commodities, except those of unusual value, classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, from Houston, Tex., to Lake Charles and Shreveport, La., and those points in Texas on and east of a line beginning at the Red River and extending along U. S. Highway 277 through Wichita Falls to Abilene, Tex., thence along U. S. Highway 83 (formerly portion U. S. Highway 277) at or near Ballinger, Tex., thence along U. S. Highway 67 to San Angelo, Tex., thence along U. S. Highway 87 to San Antonio, Tex., and thence along U. S. Highway 81 to Laredo, Tex.; and cotton, cotton linters, wool, and mohair, from the above-described destination points to Houston, Tex.

Combined operations.—Prior to temporary authority, the combined operations of the two England companies were almost wholly between Houston and New Orleans, with interchange at Lake Charles, La., and moved in substituted trailer-on-flatcar service (TOFC) of the

Southern Pacific Company. The operation was complicated by the fact that while England (La.) holds authority *between* New Orleans and points in Louisiana, and thus could operate in either direction, the rights of England (Tex.) are limited to eastbound movement *from* Houston *to* Lake Charles. Thus, while the trailers were loaded on flatcars at either Houston or New Orleans and proceeded through to the other city with interruption, the movement can be considered to have been constructively interchanged between the England companies at Lake Charles on eastound movements but needed another basis for the westbound movements. This, the carriers allege, was provided by interchange of the shipments at Lake Charles between England (La.) and the Southern Pacific pursuant to the same agreement under which TOFC was provided. It does not appear that Southern Pacific participated in any individual shipment as a participating carrier or that any division of revenue occurred between the England companies and Southern Pacific other than the flat rate charge for TOFC service. Moreover, the agreement between the England companies and Southern Pacific for TOFC and the tariff published pursuant thereto expressly disclaims any responsibility in Southern Pacific other than as a TOFC carrier.

Cessation of operation.—On April 30, 1964, the England companies ceased all operations, citing unsuccessful negotiations on a new labor agreement for work to be performed after May 1 of that year. They state that the union representing its drivers had indicated that national wage levels would be required by the new contract and that the increased expenses resulting from this wage increase would have totaled $185,000, which could not have been absorbed in its operations without substantial operating losses. Accordingly, they placed their operating authority and equipment for sale at public auction, which was conducted on June 17, 1964. The two vendees herein and Deaton Truck Lines, Inc., were the successful bidders for the interstate operating rights and the equipment.

BACKGROUND AND OPERATIONS OF STRICKLAND

Strickland, a Texas corporation, has 10 shares otstanding, of which 9 are owned by L. R. Strickland and 1 by F. B. Strickland. It is a long-line carrier, principally of general commodities, over a network of regular routes, extending between New Orleans, La., and Texas points, on the south, and Boston, Mass., on the north, serving such points as Houston, Dallas, and Texarkana, Tex., Little Rock, Ark., Memphis, Tenn., St. Louis, Mo., Chicago, Ill., Cleveland, Ohio, and New York

N. Y., plus numerous intermediate and off-route points. It has extensive terminal facilities at principal points. Although it is presently authorized to serve New Orleans, it must do so by a circuitous route from Texarkana via Houston and Beaumont, a distance of 644 miles as opposed to the more direct route from Texarkana via Shreveport, La., of 389 miles. It was alleged that Strickland may operate to New Orleans over a deviation route via Kinder, La., stated in the record to be somewhat shorter than via Houston. However, this is misleading because that deviation route applies to Dallas-Kinder-New Orleans movements. Therefore, on shipments to and from points north of Texarkana, if that deviation route were to be lawfully utilized by tacking at Dallas, it would be approximately 750 miles from Texarkana to New Orleans.

Strickland is also authorized to operate between Little Rock, Ark., Greenville, Miss., and Monroe, La., by virtue of newly-regained rights which had been under long-term lease to another carrier, and which had not been regained at the time of the hearing. However, the prospect and the ultimate effect of their being regained was considered in some detail both at the hearing and by the hearing examiner in his report and recommended order. The rights in question were leased to Burks Motor Freight Line in 1948 for 10 years with an option to renew for another 10 years at expiration. This arrangement was approved by the Commission in No. MC-FC-31502 on March 18, 1948. The option was exercised in 1958 for an additional 10 years, and, as extended, approved by the Commission in *Burks M. Freight Line, Inc.—Lease—Strickland Transp. Co.*, 75 M.C.C. 153 (1958). This lease would have nominally expired on March 18, 1968.

On August 30, 1966, the United States District Court for the Eastern District of Arkansas, Western Division, issued its judgment in *Strickland Transp. Co., Inc.* v. *Burks M. Freight Line, Inc.* which terminated the lease and returned the operating rights to Strickland. Although the judgment of the district court has been appealed by Burks, it was not stayed, and accordingly, it has become effective. Strickland has notified the Commission that it has instituted operations under those rights. Since the temporary operations by Strickland of the operating rights of England (La.) would permit operations between either Shreveport or Monroe and New Orleans, and the route by Monroe is considerably shorter from Little Rock to New Orleans than over the Texarkana and Shreveport gateways, presumably Strickland's long-line service between New Orleans and northern points is now being conducted over Monroe,

as Strickland's witness testified at the hearing that it would do. Thus, the Monroe route takes on more importance than existed at the time of the hearing when this shortcut was more remote.

As mentioned, Strickland earlier attempted to secure more direct access to New Orleans by acquisition of the stock of England, but this was denied. In August 1960, Strickland made another effort to offset its circuity to New Orleans by use of TOFC service of the Illinois Central Railroad from and to East St. Louis, Ill. This was discontinued thereafter as a result of a complaint by Gordons, a protestant herein, in *Gordons Transports, Inc.* v. *Strickland Transp. Co.*, 318 I.C.C. 395 (1962), hereinafter referred to as the *Gordons-Strickland complaint* case, where the Commission forbade such an arrangement on grounds that it provided an undue competitive advantage, allowing service different from that provided by Strickland's certificate. The Commission's decision was upheld in *Strickland Transp. Co.* v. *United States*, 219 F. Supp. 618 (1963). This decision was cited as a factor in the reasoning a short time later in Ex Parte 230, *Substituted Service—Piggyback*, hereinafter referred to as the *Piggyback Rules* case, 322 I.C.C. 301, 323, the decision which considered and promulgated the rules for so-called TOFC or "piggyback" service, and which, among others, put forth the rules that a motor carrier must have over-the-road authority to serve any two points served in TOFC service, and that the distance by rail be not less than 85 percent of the authorized over-the-road distance.[3]

The next and most recent attempt to reach New Orleans more directly began in 1961 in an arrangement by which Strickland delivered loaded and sealed trailers to England (La.) at Shreveport for transport to New Orleans and at New Orleans for the return movement. In each case the traffic and trailer was originated by Strickland and turned back to it at destination for which Strickland paid England (La.) a flat fee, irrespective of the weight or contents of the trailer. England (La.) furnished only the motive power for such movements. This arrangement ceased in May 1964 when the England companies discontinued operations, but Strickland began using the Shreveport-New Orleans route again in October 1964 when it began temporary operation of this portion of the authority of England (La.).

[3]The effective date of the rules has been stayed by the Commission on its own motion pending appeal to the courts. In *Atchison, T., & S. F. Ry. Co.*, v. *United States*, 244 F. Supp. 995, two of the rules were found by the district court to be beyond the Commission's authority to impose. However, the "85-percent" rule respecting circuity was expressly upheld. The lower court was affirmed by the Supreme Court on May 29, 1967 (G. C. Memo. 130-67).

THE STRICKLAND APPLICATIONS

No. MC-F-8798.—The two purchase applications herein contemplate a split of the destination-territory contained in the radial and other operating rights of England (La.) in No. MC-57946 (Sub-Nos. 2 and 3) along U. S. Highways 190, 165, and 90 in Louisiana. Strickland would purchase, for $495,000, that portion which authorizes transportation of general commodities, with exceptions, (1) from New Orleans and Plaquemine, to Kentwood, Amite, and Clinton, La., and (2) between New Orleans and points within 10 miles of the corporate limits thereof, on the one hand, and on the other, points in Louisiana north of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 190 to its intersection with U. S. Highway 165 at Kinder, La., thence along U. S. Highway 165 to its intersection with U. S. Highway 90 near Iowa, La., and thence along U. S. Highway 90 to the Texas-Louisiana State line, except from New Orleans to Kentwood, Amite, and Clinton, La.[4] of the purchase price, $49,500 was placed into escrow at execution of this agreement; which at consummation would be released to England (La.), and Strickland would at that time pay an additional amount to bring its total payment at consummation to 29 percent of the total adjusted consideration, i.e., the total consideration less any amounts that may have been paid as lease rental under temporary authority at the rate of $7,425 per month. The balance would be represented by five equal promissory notes, one of which would be payable on or before each of the five succeeding anniversaries of the consummation date and bearing interest at the rate of 6 percent per annum on the unpaid balance. Strickland would pay the purchase price from current funds and no borrowing would be required.

No. MC-59680 (Sub-No. 142).—Strickland seeks authority under this application to operate, over regular routes, in the transportation of:

General commodities, except household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, dangerous explosives, commodities in bulk, and commodities requiring special equipment, between New Orleans and Shreveport, La., from New Orleans, via U. S. Highway 61 to its

[4]As designated by applicants, the description is slightly deficient in that U. S. Highway 190 does not quite reach the Mississippi-Louisiana State line. The description will be amended to what was obviously intended, i.e., "points in Louisiana north of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 90 to its junction with U. S. Highway 190, thence along U. S. Highway 190," and will be hereinafter considered in this manner. The temporary authorities in these cases were also so amended by us.

intersection with U. S. Highway 190, thence via U. S. Highway 190 to its intersection with U. S. Highway 71, thence via U. S. Highway 71 to Shreveport, and return over the same route, serving all points within 10 miles of New Orleans as off-route points, and restricted against traffic originating at, or destined to points more than 10 miles from New Orleans corporate limits and on U. S. Highway 61 on or south of its intersection with U. S. Highway 190.

This application is conditioned upon approval of the application in No. MC-F-8798 to purchase a portion of the operating rights of England (La.) and is actually an attempt to change an existing irregular-route authority to regular route in frank acknowledgement that this portion of the England (La.) authority has in the past been operated as a regular route. The application does not, however, seek to alter, cancel, or otherwise relinquish any of the remaining irregular routes of England (La.) sought in the purchase transaction.

Background and Operations of Copperstate

Copperstate, together with its wholly owned subsidiaries, Valley Motor Lines, Inc., and Valley Express Co., form a large integrated system which is a portion of an even larger interlocking corporate complex. The history, operations, and corporate affiliations of Copperstate have been described in detail and approved in several recent decisions of the Commission.[5] As a system, Copperstate is authorized to operate, largely in this transportation of general commodities, over regular routes, between Portland, Oreg., and Los Angeles, Calif., between Los Angeles and several Texas points, and between Phoenix, Ariz., and Salt Lake City, Utah, serving virtually all principal intermediate points. It and its affiliates have extensive authority within this general area as to both general and specified commodities and as to specialized service to serve a wide range of intermediate or off-route points, over regular and irregular routes.

As here pertinent, Copperstate itself operates from and to the Pacific coast through Arizona and New Mexico, and enters Texas via the El Paso gateway. From El Paso its routes radiate northward and eastward to Amarillo, Dallas-Fort Worth, and Houston, forming a network in southwest Texas, but providing no direct route between those three terminal points. Between Amarillo and Dallas it must operate circuitously via Sweetwater, and between Dallas and Houston via Brownwood and Austin.

[5] *Consolidated Copperstate Lines—Pur.—Sunset M. Lines*, 85 M.C.C. 113; *Valley Motor Lines, Inc.—Pur.—Pierce Freight Lines, Inc.*, 87 M.C.C. 317, reversed on new evidence on April 16, 1962 (not printed); and *Consolidated Copperstate Lines—Purchase—Nielsen*, 90 M.C.C. 483.

THE COPPERSTATE APPLICATIONS

No. MC-F-8808.—Copperstate would purchase (1) all of the operating rights of England (Tex.); (2) those portions of the operating rights of England (La.) which authorize the transportation of general commodities, over irregular routes, (a) from New Orleans and Plaquemine, to Baton Rouge, Thibodaux, Ponchatula, and Hammond, La., (b) between New Orleans and Plaquemine; and (c) between New Orleans and points within 10 miles of corporate limits thereof, on the one hand, and on the other, points in Louisiana on and south of a line beginning at the Mississippi-Louisiana State line and extending along U. S. Highway 90 to its intersection with U. S. Highway 190, thence along U. S. Highway 190 to its intersection with U. S. Highway 165 at Kinder, La., thence along U. S. Highway 165 to its intersection with U. S. Highway 90 near Iowa, La., and thence along U. S. Highway 90 to the Texas-Louisiana State line, except from New Orleans to Baton Rouge, Thibodaux, Ponchatula, and Hammond, La.; and (3) the motor vehicle equipment of England (La.) as enumerated in the written agreement between the parties, for a total consideration of $400,000. Of the purchase price, $40,000 was placed in escrow at execution of the agreement, to be released to the England companies at consummation. The remainder would be paid $110,000 additional, in cash, at consummation, and the balance of the total adjusted consideration, i.e., the total consideration less any applicable amounts paid as lease rental under temporary authority, would be represented by five promissory notes, one of which would be payable on or before each of the five succeeding anniversaries of the consummation date, and bearing interest at the rate of 6 percent on the unpaid balance.

The purchase price is allocable $225,000 to the motor vehicle equipment and $175,000 to the operating rights. An independent appraisal shows the equipment to be valued at $209,950. All sums paid under temporary authority shall be applied as partial payment of the purchase price. In the case of the operating rights, the monthly rental is $2,500, and for the equipment, a monthly rental not exceeding $5,834.29 that being the amount due monthly on the equipment lien payments as of the date of the agreement, the amounts thereafter decreasing as the interest decreases. When Copperstate has paid a total of $105,000 as lease rental on the equipment, then the monthly rental thereon will drop to $1 until the application under section 5 is determined. The equipment would be sold to and retained by Copperstate at the $105,000 figure if the section 5 application is not approved. As the monthly lease rental for the equipment would pay the $105,000 purchase price

in approximately 18 to 20 months, and over 2 years have elapsed since the advent of temporary authority, it is safe to assume that the equipment price has now been fully paid.

No. MC-22167 (Sub-No. 42).—Copperstate seeks authority under this application to operate as a motor common carrier, over regular routes, in the transportation of:

General commodities, except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk and commodities requiring special equipment; between Houston, Tex., and New Orleans, La., serving all intermediate points, from New Orleans, La., via Interstate Highway 10 and U. S. Highway 61 to Baton Rouge, La., thence via U. S. Highway 190 to Kinder, La., thence via U. S. Highway 165 to its intersection with Interstate Highway 10 and U. S. Highway 90 near Iowa, La., thence via U. S. Highway 90 to Lake Charles, La., and to the Louisiana-Texas State line, thence via U. S. Highway 90 and Interstate Highway 10 to Houston, Tex., and return over the same route. From Houston, Tex., over U. S. Highway 90 (via Beaumont, Tex.) to its intersection with Interstate Highway 10, thence via Interstate Highway 10 and U. S. Highway 90 to Lake Charles, La., thence via Interstate Highway 10 and U. S. Highway 90 to New Orleans, La., and return over the same route.

As previously pointed out, the regular-route authority sought herein is largely encompassed by the irregular-route authority sought to be purchased in No. MC-F-8808, except that England (Tex.) holds no authority westbound from Lake Charles, La., to Houston, Tex., and to this extent the application is one for new authority.

THE EXAMINER'S RECOMMENDATIONS

The examiner found that the operations of the England companies, to the extent that he would recommend granting the applications, were lawful and continuous except insofar as England (La.) had been cross-hauling its radial basepoint of New Orleans, and that this unlawful activity had resulted from a misunderstanding of a reply to an earlier inquiry by England (La.) of the local I.C.C. supervisor regarding permissible use of its authority. To illustrate the unlawful movements, consider a shipment picked up at Shreveport, moved to New Orleans, and then delivered in Lake Charles. See *Gay's Exp., Inc.* v. *Haigis and Nichols*, 43 M.C.C. 277, and cases cited therein. He found that protestants would either be protected by the conditions he would impose or would not be materially affected by approval of the applications. On this basis, he recommended approval of the applications in Nos. MC-F-8798 and MC-F-8808 to the extent that the rights

were shown to have been operated by the England companies. But on the basis of this showing and the accompanying section 207 applications in each case, he recommended conversion of portions of the acquired rights from irregular route to regular route, subject to certain restrictions which he thought appropriate, and cancellation of the remainder because of dormancy.

The Strickland applications.—The examiner recommended approval of the application in No. MC-59680 (Sub-No. 142) by which Strickland would be granted authority to transport general commodities, with exceptions, over a regular route, between Shreveport and New Orleans. He also found that the application to purchase in No. MC-F-8798 should be granted as to that portion of the operating rights of England (La.) between New Orleans and Monroe, serving a number of intermediate and off-route points, and that that authority should be then redescribed as a regular route, citing the Commission's action in *Deaton Truck Lines, Inc.—Purchase—Lavender,* 97 M.C.C. 256 (decided August 7, 1964), hereinafter referred to as the *Deaton-Lavender* case, upheld in *Alabama Highway Express v. United States,* 241 F. Supp. 290, and affirmed, *per curium,* by the Supreme Court at 382 U. S. 106. In each case he would restrict the authority to be acquired or granted against combining with any other operating rights held by Strickland to provide a single-line service between New Orleans and the Memphis, Tenn., commercial zone, and he would similarly restrict the Monroe-New Orleans route against combining to provide a service between points on that route and those in the Shreveport commercial zone.

The Copperstate applications.—The examiner recommended approval of the application in No. MC-F-8808 subject to certain conditions and restrictions. He would authorize acquisition of the general commodity, irregular-route rights of England (La.) in No. MC-57946 (Sub-Nos. 2 and 3) from New Orleans and Plaquemine to Thibodaux, Ponchatoula, and Hammond, between New Orleans and Plaquemine, and between New Orleans and points within 10 miles thereof, on the one hand, and on the other, the described area of Louisiana south of U. S. Highways 90, 190, 165, and 90. He would also grant the application as to Houston-New Orleans service, and pursuant to a grant of the accompanying section 207 application in No. MC-22167 (Sub-No. 21), would define the emerging irregular-route authority of England (La.) and England (Tex.) to provide for a regular route between Houston and New Orleans, serving the intermediate points of Baton Rouge and Lake Charles, the off-route point of New Iberia, La., and points within 10

miles of New Orleans, unrestricted, and Beaumont, Tex. on eastbound traffic only. This route would be only over Interstate Highway 10 rather than the several routes requested by applicants. The entire authority which he would grant would be subject to restrictions (1) that the regular- and irregular-route rights could not be combined to provide a through service between points on the regular routes and points on the irregular routes other than Plaquemine, Thibodaux, Ponchatoula, and Hammond, and (2) that the authorities be restricted against traffic moving from, to, or through points in Louisiana north of U. S. Highways 90, 190, 165, and 90.

EXCEPTIONS OF PROTESTANTS

Exceptions were filed by Arkansas-Best and jointly by Gordons and Campbell Sixty-Six to the report of the examiner as it pertains to the Strickland applications. Similarly, Ryder, Central, and Saia filed exceptions to the report only as it applies to the Copperstate applications. Exceptions as to all applications were filed by Red Ball, Herrin, and Braswell. As the points raised on exceptions are substantially similar, they will be stated collectively as to each vendee-applicant unless specific reference to a certain protestant is deemed necessary.

The Strickland applications.—Protestants urge that the operations of England (La.) were dormant, both constructively and in fact. They point out that the England companies simply abandoned their operations in May 1964 on the basis of being unwilling, not unable, to conduct operations because of the mere possibility, not certainty, of a future labor dispute and its effect, and that no operations were conducted under their operating rights until October 1964 when temporary authority was granted. They further charge that the unlawful aspect of certain of the operations render them inadmissible as evidence of an active and continuous service. They state that the purchase price is unreasonable, particularly in view of the prior *Strickland-England* case in which a much smaller amount was found excessive, and that a strong suspicion exists that vendor's stockholder is trafficking in operating rights.

Protestants strongly urge that the Shreveport-New Orleans operation of Strickland and England (La.) was unlawful since they conducted regular-route operations over irregular-route authority, both before and during temporary authority, in violation of the principals enunciated in *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23, hereinafter called the *Brady* case. Also, they call unlawful the so-called "interchange" at Shreveport and New Orleans which they characterize variously as (1) control of the operations of England

(La.) by Strickland, or (2) a pooling of traffic and services in violation of section 5(1) of the act. They also charge that the examiner wrongfully held this proceeding as not a proper place to adjudicate these questions of unlawfulness and in styling the Strickland-England arrangement as merely "novel," pointing out that it was essentially the same arrangement that was stopped in the *Gordons-Strickland complaint* case, and that he accordingly erred in finding that the arrangement did not impinge on the fitness of Strickland nor cast the "curse of dormancy" upon England's authority between Shreveport and New Orleans because those operations "were not challenged by the Commission or other carriers for 2½ years" and thus may not now be considered.

Additional assignments of error which protestants attribute to the examiner's report are that he erred in finding that the illegal cross-hauls of a radial base point by England (La.), which he did find to have occurred, were the result only of a misinterpretation of a supervisor's letter by the president of that company; that he erred in stating that other carriers, including protestants, engage in similar practices as Strickland and England (La.) in the Shreveport-New Orleans arrangement, there being no facts of record to support such an assertion and the arrangement having no parallel to a true interline arrangement or commercial-zone delivery; that he erred in stating that Herrin is unlikely to be affected by approval; and that he erred in failing to include Chicago and St. Louis along with Memphis in the protective restrictions to be imposed, or in finding that the extra costs involved in circuity would relieve competition.

They state that Strickland would put the operating rights to be acquired herein to a totally new and different service than that for which they were originally granted, and that the division sought would result in a confusing, illogical, and impractical carving-up of the rights of England (La.), which would permit the same service to be provided by as many as three different carriers, operating through overlapping commercial zones, where only one previously operated, and this in spite of the cumbersome and confusing restrictions which would be imposed by the examiner. They call amazing the granting of the Monroe-New Orleans route, an authority not even requested by applicants, and in an unfair result since it was not published as such and thus could not be anticipated or specifically opposed by protestants. The examiner's reliance upon the *Deaton-Lavender* case was improper, they charge, since that case actually restricted the operating rights granted while the recommended result herein would upgrade the irregular routes to regular route. And finally as to the

section 5 application, they assert that no public need was shown for reinstitution of the dormant rights.

Specific exceptions to the section 207 application are that there was no evidence warranting conversion of the transferred irregular-route rights to regular route, there being a total failure to show public convenience and necessity but rather witnesses who expressed merely a desire as opposed to a need for Strickland's service; that the examiner erred in granting authority to serve intermediate points on the routes granted since applicants did not seek it in their application nor was such request contained in the publication thereof; that there is no evidence to support the selection of the particular points granted; and that the examiner failed to make certain statutory findings respecting sections 207 and 214, which makes his report fatally defective. They assert that examiner also failed wholly to deal with certain issues and contentions raised by protestants on brief or to rule concerning certain requested findings of fact or conclusions of law.

The Copperstate applications.—Exceptions to the examiner's recommendation in the Copperstate applications are similar insofar as charges of actual and constructive dormancy, abandonment, and the reasonableness of the purchase price. Specifically, they charge that the operation by the England companies wholly in TOFC service between Houston and New Orleans constituted abandonment of highway operations, and the operating rights to that extent are therefore dormant. Also, they charge unlawfulness in the use of the irregular routes as regular routes, citing the *Brady* case, between Houston and New Orleans. Primary among their exceptions is that England (Tex.) conducted unlawful operations from Lake Charles to Houston, utilizing railroad service without authority, and that the examiner erred in characterizing this as lawful interchange or "pure railroad freight." They point out further that Copperstate has continued during temporary authority the unlawful operations formerly conducted by England (Tex.) by the same or other devices. They charge that the examiner erred in finding that these unlawful practices were not before the Commission in this proceeding.

Protestants also claim that the examiner erred in finding that the England companies moved traffic from New Orleans to Texas points in competition with Red Ball; that he erred in not finding that there was no public need shown for reinstitution of England's dormant service; that he erred in finding that Braswell could stand the additional competition which would be afforded by Copperstate; and that he erred in minimizing the effect of the loss of revenue to Ryder from traffic formerly interchanged with Copperstate at Houston.

With respect particularly to the section 207 application, protestants assert that applicants failed to sustain their burden of proof in showing

public convenience and necessity for the requested authority, but only showed a desire for the services of Copperstate coupled with the unfamiliarity as to other available services or comparatively minuscule complaints concerning them. They charge that the examiner erred in finding the services of Herrin and Ryder insufficient between Houston and Louisiana points or that Central and Red Ball would not be affected by the new regular-route service of Copperstate. They also charge that he erred in finding a need for westbound service by Copperstate from Lake Charles to Houston, particularly in finding that the proof of need for eastbound service reduces the quantum of required evidence of need for westbound service also. They charge that the examiner did not make the statutory findings that Copperstate is fit, willing, and able, which makes his report fatally defective, and that there is evidence in the record to the contrary, even if they had been made. Protestants state that there is no resemblance between the authority that the examiner recommends and that which presently exists in vendors, but that the examiner's recommendation seeks mainly to accommodate Copperstate.

REPLIES OF APPLICANTS

Reply of Strickland and England (La.).—The joint reply in the Strickland applications states that protestants fail to submit any specific evidence of traffic which they would lose by approval; that the revenues and earnings for each protestant to the Strickland applications show significant gains for each during the period Strickland was operating a portion of the authority of England (La.) under temporary authority; that applicants filed promptly upon cessation of operations by England (La.) on April 30, 1964 and were not lax in seeking to obtain it but that approval could not be obtained from the Commission until October 5 of that year, following which Strickland promptly instituted operations; that the prior *Strickland-England* case, negotiated in 1958, affords no basis for passing on the purchase price in this proceeding, arrived at in 1964 at public auction at which several of the protestants participated and helped to bid up the price to the level finally reached; that the earlier case was actually denied on grounds other than purchase price; that the proposed division of the authority of England (La.) is not confusing, illogical, and impractical— nor is it novel, but similar divisions have been approved by the Commission in several previous instances; and that the procedures employed in the Strickland-England interchange at Shreveport and New Orleans were carried on with the full knowledge of protestants and Commission employees.

They request that the examiner's report be upheld but that one condition he would impose be removed: that which would require the Strickland and Copperstate transactions to be consummated simultaneously and that one not be consummated without the other. They state that the operating rights of England (La.) are readily divisible and could reasonably be consummated independently of each other.

Reply of Copperstate.—In its reply Copperstate also points out that the temporary dormancy in the operations of the England companies was not excessive or unusual, similar cases having been approved many times in the past; that the operations of England (La.) in the areas south of U. S. Highways 90, 165, 190 and 90 had been sufficiently frequent and widespread to meet the Commission's test of substantiality; that there were no knowing or willful unlawful operations by England; that Ryder made no specific showing of traffic that would be diverted to Copperstate following approval nor is any likely; that numerous shippers testified as to a need for new and additional service, citing complaints against existing service, including that of protestants; that Copperstate met its burden of showing a need for westbound service but simply showed less testimony than as to eastbound service; and that protestants present a confused argument as to whether the Houston-New Orleans service is regular route or irregular route, the matter being at best a borderline situation which Copperstate seeks to alleviate by seeking regular-route authority, one of the alternatives presented in the *Brady* case.

Discussion and Conclusions

The Strickland applications.—First, we wish to reject the charge of actual dormancy in the England operations, notwithstanding the fact that circumstances surrounding of the precipitous cessation of operations in May 1964 raise the inference that the England companies were merely unwilling, rather than unable, to continue. The reason for a cessation of operations is not significant under section 5. We gave due consideration to this aspect of the case in the earlier actions for temporary authority, wherein the applications were at first denied, then granted upon petitions for reconsideration, which accounts for the fact that several months elapsed between the filing of the application and the reinstitution of operations. Such brief lapses of service are not unusual and have been present in applications approved in the past where temporary authority was granted, without constituting dormancy of the operating rights. However, we wish to emphasize that an application

for temporary authority is decided without a hearing and without unnecessary delay. Approval of temporary authority is merely an acknowledgement on our part, in our discretion, that there is evident danger of injury to operating rights that are worth preserving. As the temporary authority order states, the grant raises no presumption as to action that may be taken subsequently under section 5 when we have had the benefit of more leisurely and detailed scrutiny of the proposed transaction.

This brings us to the matter of constructive dormancy, which for purposes of this inquiry may be defined as the conduct of operations that may not be considered because they were unlawful or not conducted in accordance with the Commission's rules and regulations. In this matter we do not agree that the arrangement of Strickland and England (La.) between Shreveport and New Orleans may not now be questioned because not challenged for 2½ years. The question of fitness is always before us in section 5 proceedings. *United States Van Lines, Inc.—Purchase—Bell,* 90 M.C.C. 362. Protestants urge that the arrangement was either an unlawful pooling of traffic and services or an unlawful control by Strickland of the operations of England (La.). We do not agree that the arrangement was either of these things. Our findings as to what the arrangement constituted requires first that more detailed analysis of the actual operation be conducted.

The evidence shows that Strickland transferred loaded and sealed trailers to England (La.) at Shreveport for transport to New Orleans and at the latter point for transport in the opposite direction. In practice, Strickland notified England (La.) of how many trailers it would have on any given day at each end of the line segment, and England (La.) sent tractors to Strickland's terminals at New Orleans or Shreveport to pick them up. At the opposite end the trailer was delivered intact and still sealed to Strickland's terminal. In New Orleans Strickland broke bulk for distribution to other points, some of which was interchanged to other carriers (including England (La.) for delivery to certain points in Louisiana). At Shreveport the record is less explicit, but judging from the abstract of shipments submitted, presumably the trailer was then simply shifted to a Strickland tractor for movement to distant cities in the upper midwest and east. England (La.) cut no bills on the individual shipments nor was it shown as a connecting carrier on Strickland's bills, except that some of the bills issued by Strickland on shipments transported in this manner bore a rubber stamp to show the routing. It did not pick up, deliver, nor participate in billing or claims as to the shipments. In fact, vendor's president testified that, in order to prepare his abstract of shipments as to traffic transported

under this arrangement, it was necessary for him to secure the freight bills from Strickland at its New Orleans terminal, and they are listed in the abstract in groups under an England manifest which lists them by Strickland PRO numbers. England (La.) did not share in a pro-rata division on each shipment but received a flat sum for hauling a trailer, full or empty, between New Orleans and Shreveport. Most of these trailers used were Strickland's, a few were England's, but in neither case does there appear to have been any lease arrangement as to particular trailers, it being testified that England's trailers were "quickly absorbed into the trailer interchange."

This does not constitute interchange within the meaning of our rulings, nor is it any form of interlining as we define it. Interlining is the practice whereby a carrier transfers a *shipment* to another carrier at a point of joint service for delivery or for further movement and later interline with another carrier. Interchange is a kind of interline which involves the exchange of equipment, here trailers but often tractors and trailers with or without drivers. Compare *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 121. Usually interchange involves loaded vehicles, but in any form it is governed by the *Lease and Interchange of Vehicles Rules*, 49 CFR 307.[6] England and Strickland have not offered lease agreements covering such of Strickland's trailers as were used, and the flat charge for their movement was the same no matter whose equipment was used. If for no reason than failure to comply with section 307.5(c) of those rules, the arrangement between applicants here was not a lawful interchange. That section requires an arrangement under which:

> * * *the rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

England (La.) had no liability to the actual shippers nor is there anything to suggest that England (La.) exercised control or responsibility over the traffic or that it functioned as an independent interchange carrier, as required by law. Because there was no lawful interchange, there was no lawful use of the rights of England (La.). Because the operations were really under the management and control of Strickland, insofar as the relationship with and liability to shippers was concerned, they constitute operations by Strickland without possession of a certificate.

[6]Previously designated 49 CFR 207; renumbered April 1, 1967, when all section designations in 49 CFR were increased by 100 numbers.

We conclude that the Shreveport-New Orleans movements of loaded trailers handling traffic of Strickland purportedly under the rights of England (La.) were unlawful. In addition, to the extent such traffic had a prior or subsequent movement by England (La.) between New Orleans and other Louisiana origins or destinations under the same irregular-route rights, unlawful cross-hauling was also involved. Such unlawfulness reflects adversely on the fitness of both applicants. Even if we did not so find, we note that applicants in a section-5 proceeding have the burden of proving that the vendor performed substantial and lawful movements under the rights involved in the transaction. *Dealers Transit, Inc.—Control and Merger,* 93 M.C.C. 611, 619. Applicants have not borne this burden. Whether this be pooling, interchange, or constructive control or lease by Strickland of the England (La.) rights, it was not authorized, not in compliance with our rules and regulations, and not lawful. Any way we slice the apple of the arrangement between applicants, it comes out wormy.

Applicants admit that the arrangement described was novel. Such admission coupled with their failure to ascertain, even if they did not prove, the lawfulness thereof, adds an element of willfullness. Such a conclusion is particularly significant since a previous effort by Strickland to find a short way to move traffic from the midwest to New Orleans had been found unlawful in the *Gordons-Strickland* complaint case. There speculative use of another "novel" arrangement after that experience borders on foolhardiness.

While we have sometimes approved applications under section 5 despite unlawful prior operations of vendor, such a finding is generally where vendor but not vendee committed the violations, where the operations were conducted under color of right in the honest belief that they were lawful, where an overriding public need for lawful future operations was shown, or where all such elements were present. Here none of these exceptional conditions seems to exist.

We cannot agree with applicants and the examiner that any reasonable interpretation of the previously mentioned letters from the local supervisor for this Commission authorizes the cross-radial movements through New Orleans. The unlawfulness of such practices has been discussed, defined, and prohibited in cases too numerous to mention since 1941 or earlier. Nor does the fact that shipments were turned back to Strickland before being interlined again to England (La.) relieve the unlawfulness. *Colonial Refrigerated Transp., Inc., Ext.—Several States,* 79 M.C.C. 57, 63. No color of right can be considered plausible here either.

The shipper testimony here is mostly from shippers far distant from the routes involved, shippers who have many alternative methods of handling their traffic. Even those whose traffic is more local to the area seem to have no real complaints of inadequate service from existing carriers. Without support of lawful prior operations involving similar traffic, the testimony of shippers supporting the Strickland applications does not show any public convenience and necessity such as to mitigate or excuse the unlawfulness of both the applicants in their joint operations.

There remains the question of whether there are any other operations of England (La.) that can be found sufficient to support a finding of an active and continuous service such as would warrant approval of the application. Insofar as the portion of England's operations involved in the Strickland application are concerned, the only other active service shown was between New Orleans and Monroe, via Alexandria, where vendor testified it operated one truck daily. We are not overly concerned with the fact that England (La.) might have operated irregular-route authority as regular route, since under recent rules this would simply mean that England (La.) should have initiated steps to convert the authority on the basis of the changed usage. But we do note that the service performed appears from the evidence to have been strictly a distribution service from New Orleans of shipments received in interline from long-line carriers, including Strickland. This becomes very important when the use to which Strickland would put this authority following approval is considered and also raises the specter of cross-hauling again.

It is clear that the examiner sought to resolve the difficult set of circumstances in this application by recommending the transfer only of those rights of England (La.) that had been shown to have been operated, while taking recognition of the different use to which the rights would be put. Thus, he would approve and convert in one action while taking notice of the result which would occur when the Strickland rights under lease to Burks were regained and the route via Monroe would thus become vastly more important than via Shreveport, a situation which has now arrived. He would blunt this new service prospect somewhat by restricting the Monroe route against New Orleans-Memphis traffic.

Ingenious as this solution appears, it cannot meet with our approval. Conversion of a portion of England's irregular route rights to a regular route without any request by applicants or publication to the public is a result that could not be anticipated by protestants nor does it give them opportunity to show the adverse effect of such an approval. Moreover, the effects of such a move, providing the final link over the

Monroe gateway in a regular route extending from Boston to New Orleans would create a service which is so vastly different from the simple peddle service provided by England out of New Orleans that an entirely new and different service would be created, which could not but have an adverse effect on the existing competitive situation. Nor does restricting the authority granted against Memphis-New Orleans traffic, as the examiner recommends, furnish a solution to the effect on traffic to other points. As we found in the *prior Strickland-England* case, the acquisition of England's irregular route rights by Strickland and conversion to a link in its long-line regular routes would be of little public benefit and would be certain to harm the operations of existing carriers. The application in No. MC-F-8798 under section 5 will be denied for all the foregoing reasons.

As the application under section 207 in No. MC-59680 (Sub-No. 142) was made directly related to and contingent upon approval of the section 5 application, it must also be denied.

The Copperstate applications.—The previous discussion applies equally to the Copperstate applications insofar as contentions of dormancy based upon cessation of operations are concerned. Copperstate, like Strickland, began operations promptly following the grant of temporary authority in October 1964, a not unduly long period of time after England's cessation of operations. More subtle is the charge that England's operating rights over-the-highway were abandoned by the exclusive use of substituted rail service between Houston and New Orleans. Protestants cite the finding of the court in the review of the *Piggyback Rules* case as authority for this contention.

While it is true that the court in reviewing the *Piggyback Rules* case did express its view that a certificate to operate over the highways as a motor carrier did not authorize, nor was it utilized by the use of, substituted TOFC service, we are not inclined to accept that interpretation in this context. Not only is the court's decision in the *Piggyback Rules* case currently pending on appeal to the Supreme Court, and thus not finally decided, but the right to utilize TOFC service for all or a portion of its lines-haul operations was expressly provided in Rule 4(e),[7] a rule which was not under attack in that review of the case,[8] and thus the issue cannot be considered to have been finally determined. Moreover, the issue of whether motor carriers can lawfully utilize TOFC service for all or a portion of its line-haul movement is currently on review in the courts on a separate appeal from the *Piggyback Rules*

[7]Rule 4(e), 49 CFR 500.4(e) states: "Where joint intermodal TOFC service is to be performed in lieu of a motor or water carrier's authorized all-highway or all-water route, tariffs embracing rates or charges covering such service may provide for the performance of TOFC service for the entire line-haul movement."

[8]In the court's introduction to its opinion, it stated that plaintiffs in the action sought only to nullify rules 2, 3, 5 and 7.

case, brought in the United States District Court for the Northern District of Texas.[9] The latter review has been heard but no decision has been rendered as of this date. Unless and until we are faced with a final rejection of Rule 4(e), we prefer to stand by the rule and the reasoning in the *Piggyback Rules* case under which it was promulgated. Accordingly, the operations of the England companies in substituted service between Houston and New Orleans, to the extent that they were lawful, support the contention that the England companies' use of their rights was active and continuous, and such service does not constitute abandonment of its over-the-road rights such as would support a finding of dormancy.

This brings us to the issue of lawfulness in the combined operations of the England companies, particularly as regards the alleged interchange at Lake Charles. We have indicated in our statement of the facts that eastbound movements can be regarded to have been constructively interchanged between England (La.) and England (Tex.) at that point despite the fact that the flatcar moved through Lake Charles directly to New Orleans without physical handling or interruption of any sort. This is influenced by the fact that the two companies are under common control and management, operating in a coordinated service such as they could perform, if they wished, on nearby highways. Moreover, the indicia of interline is present in that England (Tex.) delivers the trailer to Southern Pacific in Houston, and England (La.) picks it up in New Orleans, each usually cutting its own bills for its share of the operation and participating in a division of the revenue from each shipment as in interline situations.

But the reverse operation strains our credulity. Here England (La.) quite legitimately consigned its trailer to Southern Pacific at New Orleans for transport to Lake Charles on flatcar, but we cannot conceive that the freight was interlined to Southern Pacific at that point or became "pure railroad freight" to Houston on the facts shown. It is admitted by applicants that Southern Pacific did not physically handle the freight or trailer in any way, cut bills, share in the revenues (except for its contracted TOFC charge), deliver, or in any way participate in any shipment, its function ending when it removed the trailer from its flatcar at Houston and placed it in its yard, still sealed, for pickup by England (Tex.).

Moreover, even if we were to accept this concept of interline with Southern Pacific, the role of England (Tex.) at Houston becomes incompatible, since England (Tex.) took charge of the trailer completely, broke bulk, delivered, and interlined with other carriers for points beyond Houston; all in its own name. Since England (Tex.) held no

[9] Civil Action No. 4-355, Lone Star Package Car Co., et al. v. United States.

operating rights from Lake Charles to Houston, and since the movement between those points took place ostensibly under Southern Pacific's authority, its position could be at best that of a terminal carrier operating pursuant to section 202(c)(2) of the act[10] under the direction and responsibility of Southern Pacific. Neither the TOFC contract nor the methods by which the principals operated give support to any such theory. The conclusion is inescapable that England (Tex.) was engaged in operations from the Texas-Louisiana State line to Houston for which it held no operating authority. These operations were thus unlawful and may not be considered.

This is not the forum to decided whether Southern Pacific participated, knowingly or unknowingly, in a violation. Since the railroad did not appear at the hearing to explain its version of the purported interchange, we must accept at face value its statement in the TOFC contract that it was performing only a contractual TOFC substituted service for England (Tex.) between Lake Charles and Houston. In so doing it evidently provided a substituted TOFC service for a motor carrier which had no authority to perform such service. Although railroads are under no obligation to police the operations of motor carriers with respect to their certificates, when they enter into substituted rail-for-motor arrangements with such carriers, they should satisfy themselves that the motor carriers have authority to transport the commodities concerned between the points where the service is to be performed. *Movement of Highway Trailers by Rail,* 293 I.C.C. 93. This principle was reiterated in the *Piggyback Rules* case, at page 365. The record is cloudy as to whether Southern Pacific is presently performing such service for Copperstate under temporary authority, and if so under what arrangement. It was stated that Copperstate continued to operate in TOFC service from Lake Charles to Houston for a brief period following the initiation of temporary operation of the rights of England (Tex.), and there is inference that it continues to do so on occasion. If so, this practice should be immediately halted, unless such operations are all-rail movements from Lake Charles to Houston, and so billed to shippers and consignees.

[10]49 U.S.C. 302(c)(2). Section 202(c)(2) reads as follows:

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

"(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

As to the service which the England companies performed, either lawfully or unlawfully, between Houston and New Orleans, the evidence is that it consisted largely of water-borne truckload traffic received from Sea Land service as opposed to general interline operations with other motor carriers. They did not operate directly to other Texas points nor was the traffic which England (Tex.) interlined at Houston with other carriers a significant factor—certainly not when compared with the new and totally different service or the magnitude of use which would occur with the operating rights in the hands of Copperstate, a carrier with rights extending to the Pacific Coast.

The evidence also shows that England (La.) has likewise operated an unlawful cross-radial haul of New Orleans on traffic bound from Baton Rouge to Houston. While it has authority to operate *from* New Orleans *to* Baton Rouge, it has no direct authority for a return movement except by utilization of the New Orleans based radial right. The only rationale, therefore, on which the movements could have been performed was the aforementioned letter from the supervisor which England (La.) interpreted as authority to conduct a cross-haul operation. However, it appears that Copperstate, following the institution of temporary authority, continued such unlawful movements and informed the examiner at the hearing that it would continue to solicit traffic at Baton Rouge for movement west of New Orleans "until told by the Commission to stop." We believe that a carrier of the size and experience of Copperstate should not have to be told to stop an unlawful operation, particularly when the unlawfulness has been brought to its attention. The conduct of an operation for which no authority exists, and in addition, the brash statement of its intention to continue the unlawful movement constitutes a willful and defiant disregard for regulation which brings the fitness of Copperstate into question. If any question presently exists, England (La.) and Copperstate are directed to discontinue the unlawful movement from Baton Rouge to points beyond New Orleans unless and until appropriate operating authority therefor has been obtained and a certificate issued.

On the basis of the use to which the operating rights sought by Copperstate were put by the England companies prior to this transaction, coupled with the substantial unauthorized carriage both before and during temporary authroity, and the greatly differing use to which those rights would be put following approval, we feel that the transaction in No. MC-F-8808 would not be in the public interest and will be denied.

No. MC-22167 (Sub-No. 21).—Having found that the purchase by Copperstate should be denied, the remaining issue is whether the ap-

plication in No. MC-22167 (Sub-No. 21) may nevertheless be approved. We may properly consider such an application when related to or accompanying (but not wholly dependent upon) a section-5 application notwithstanding that the section-5 application has been denied. *Rocket Transport, Inc.—Purchase—Bush Transfer, Inc.*, 87 M.C.C. 285. In so doing, however, the issue must be determined solely upon the question of public convenience and necessity, as provided in section 207 of the act, without respect to the accompanying section-5 application.

Copperstate introduced a total of 90 shipper witnesses, two traffic associations, and three other motor carriers, all of which gave testimony in support of the application. The traffic associations, representing the interests of New Orleans and Portland, Oreg., shippers, gave general support to the Copperstate applications on behalf of their members. The three motor carriers all serve points in the southeastern United States, terminating at New Orleans on the west, and support the application for the purpose of interline connection from that point to Texas points and the west coast. The 90 shippers are of a wide range of commodities, and are located in Louisiana, including New Orleans and Baton Rouge, Texas, Arizona, California, and Oregon. The hearing examiner, in appendixes H, I, and J to his report, has ably summarized the testimony of the various shipper witnesses as to their reasons for needing Copperstate's service, and those appendixes are hereby incorporated herein by reference. In them, the testimony is separated on the basis of the direction of movement, origin, and destination sought, as follows—

Appendix H—Analysis of shipper and receiver evidence supporting Copperstate application No. MC-22167 (Sub-No. 21), for westbound service from such points in Louisiana as Baton Rouge, New Orleans and other points on the requested regular routes in Louisiana to Houston and beyond.

Appendix I—Analysis of shipper and receiver evidence supporting Copperstate application in No. MC-22167 (Sub-No. 21) for eastbound service from Houston and points west thereof directly to Baton Rouge and other points in southern Louisiana located on the requested routes even though they also ship to Lake Charles, New Orleans, and points within 10 miles of New Orleans.

Appendix J—Analysis of shipper and receiver evidence supporting eastbound service to Beaumont, Tex., Lake Charles, New Orleans, La., and points within 10 miles of New Orleans from—

(1) Houston, itself,
(2) points in Texas located on the regular routes of Copperstate, and
(3) points located on the regular routes of Copperstate west of El Paso

The total number of summaries is larger than the total number of shippers, since certain of them expressed a need for service in more than one category. Our evaluation of this testimony is on the same bases.

The testimony of 15 shippers and receivers of freight are included in appendix H, some of them shippers from the New Orleans and southern Louisiana area, and the others, receivers of freight at west Texas points. Nearly all stated a preference for the service of Copperstate based upon its promise of a faster and more direct service—for example, a second morning service from New Orleans to west Texas. On cross-examination, one shipper was unable to show, however, that the service he had received from Copperstate was significantly different from the service he had received from other carriers. Five of them expressed minor dissatisfactions with existing carriers such as occasional late pickups, difficulty in securing proper equipment, or trouble in tracing shipments. Six expressed satisfaction with existing carriers, and several admitted that they were unfamiliar with or had not used the service of available carriers. The best support in this category is one shipper which uses private carriage to the west coast and will not (under its company policy) use any common carriage which involves a two-line interchange service. However, this carrier uses Herrin to Dallas and is quite satisfied with that carrier. Two of the shippers had been served unlawfully from Baton Rouge to Texas points under temporary authority by Copperstate.

Appendix I, comprises the testimony of 56 shippers, of which 4 are receivers of freight at New Orleans and Baton Rouge from Houston, and the remainder are shippers, 23 from Houston, 7 from other Texas points, 27 from California, 2 from Arizona, and 2 from Oregon. Most stated a preference for Copperstate. Nineteen expressed minor dissatisfactions with existing carriers, such as difficulties in tracing and too late (or too early) pickups. Most also used existing carriers, Braswell, Herrin, or Ryder for the most part, and many of them were satisfied with their service—or at least expressed no dissatisfaction with it. Eleven stated that they had already diverted their traffic to Copperstate under temporary authority or intended to divert based upon Copperstate's promise of a faster or single line service. Some of them were unfamiliar with the service of existing carriers. Many expressed the usual desire of shippers for extra carriers or for a single line service, in this case to New Orleans from California or Oregon. Seven stated a desire for service beyond Louisiana to southeastern points which would necessitate interchange by Copperstate at that point with other carriers.

Appendix J is divided into 3 groups of shippers. The first, comprising 7 shippers, seeks Copperstate's service only from Houston to Beaumont, Lake Charles, or New Orleans. One seeks only an extra carrier in addition on to those already available, two of them use and are satisfied with Herrin, three have minor complaints against existing service, two complained that certain carriers are not interested in their traf-

fic, several have diverted their traffic to Copperstate from existing carriers under temporary authority, one seeks service beyond New Orleans, and two expressed no dissatisfaction with existing service. The second group, 12 shippers, seeks service from other Texas points to New Orleans and most state a preference for Copperstate. Two seek principally a single-line service to New Orleans and three express a desire for service beyond New Orleans. Five have minor complaints with existing service, two have already diverted to Copperstate, and three use other carriers with whom they are generally satisfied. One showed no continuing need for any service.

The third group in appendix J, comprising 51 shippers, is located west of El Paso. Most are in California and the rest in Arizona or Oregon. Most of them have in the past been Copperstate shippers in joint line service at Houston and have no complaints with that service, although they would prefer to have Copperstate furnish a single-line service. Most also use other single- and joint-line carriers for the same service with only a few complaints. Twenty want service either partially or predominantly beyond New Orleans. Nineteen had already diverted to Copperstate's single-line service to New Orleans in place of its joint-line service or that of other carriers.

We have given great consideration to the fact that a large number of shippers have testified in favor of Copperstate's extended service to New Orleans. Nevertheless, we conclude that the public convenience and necessity has not been shown for the institution of such service by Copperstate nor have these shippers shown a need for any service that cannot be supplied by existing carriers. Reduced to its essentials, the numerous shippers have simply expressed a preference for Copperstate, seek additional carriers in addition to those already available, or seek a single-line service over a longer distance. Preference is not a substitute for need where an area is served adequately by established carriers. The mere showing by an applicant of its own fitness and of the shipper's desire to use its proposed service are not sufficient of themselves to warrant a grant of the authority sought. *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254. There is presently an abundance of service between Houston and New Orleans, two of the nation's major population centers, both by protestants and other carriers alluded to in the record. Testimony of record also shows that much of the traffic that Copperstate would generate (or has already generated) would be at the expense of existing carriers. Ryder, in particular, showed that a substantial amount of traffic which it formerly received in interline at Houston from Copperstate has been diverted to the latter's single line service under temporary authority. We recognize a shipper's natural inclination to prefer to have available as many motor carriers as possible to serve it. But it is incumbent upon us

before authorizing a new service to be reasonably certain that a public need exists for such operation which cannot be met adequately by existing transportation facilities. *Dallas & Mavis Forwarding Co., Inc., Ext.—Toledo to Nebr.*, 76 M.C.C. 273.

Nor is the desire for a single-line service, particularly from points located more than half a continent away from the destination in question, of compelling significance. The Commission has usually held that shippers are not entitled to single line service where satisfactory and adequate joint line service is available. *Watkins Motor Lines, Inc., Ext.—Canned Goods—Iowa*, 74 M.C.C. 795. Interline service between two, or even among three carriers, cannot be said to be per se inadequate, particularly where, as here, transportation is sought to very distant points. *Curtis, Inc.* v. *United States*, 225 F. Supp. 894. Moreover, many of these shippers who desire a single-line service from west coast points to New Orleans actually seek service largely beyond New Orleans to points in the southeastern States, which means that interline would be required at New Orleans in any event. In these circumstances it seems hardly of consequence to these shippers whether interline, on what is practically a transcontinental movement, occurs at Houston or New Orleans. The lack of need shown for an extension of Copperstate's authority, coupled with the questionable aspect of its fitness in conducting temporary operations impel us to deny the application for new authority under section 207.

We find, in No. MC-F-8798, that the transaction proposed has not been shown to be consistent with the public interest and that the application accordingly should be denied.

We further find, in No. MC-59680 (Sub-No. 142), that the public convenience and necessity has not been shown to require operation by Strickland Transportation Co., Inc., as a motor common carrier of general commodities, with exceptions, over a regular route, between Shreveport and New Orleans, La., and that application will accordingly be denied.

We also find, in No. MC-F-8808, that the transaction proposed has not been shown to be consistent with the public interest and that the application should be denied.

We further find, in No. MC-22167 (Sub-No. 21) that the public convenience and necessity has not been shown to require operation by Consolidated Copperstate Lines, as a motor common carrier of general commodities, with exceptions, over regular routes, between Houston, Tex., and New Orleans, La. and that application will accordingly be denied.

An appropriate order will be entered.

COMMISSIONER BROWN, dissenting:

I disagree with the majority and would approve the applications along the lines recommended by the hearing examiner. In my opinion these cases are being decided, at least to a great extent, upon technicalities or issues not raised by the parties. For example, the majority relies heavily upon its interpretation of section 307.5(c) of the Lease and Interchange of Vehicles Rules to find the Strickland–England interchange arrangement unlawful. At the same time, no thought has been given to section 307.5(a) of those rules, which provides that "the use to be made of the equipment and the consideration for such use" shall be set forth in the interchange agreement. While the report states that "England and Strickland have not offered lease agreements," the fact of the matter is that no one asked them to do so. I, therefore, would not condemn them for failing to fulfill a request that was never made.

The Copperstate cases likewise contain a vast amount of evidence which I believe warrants much better treatment than accorded by the majority.

In conclusion, I feel that substantial evidence was offered by applicants in these cases and that, contrary to the majority, it should not be treated as a porous product or one which will hold no more water than a crocheted bathtub.

CHAIRMAN TUCKER, whom COMMISSIONER DEASON and STAFFORD join dissent.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 31st day of July 1967.

No. MC-F-8798

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 142)

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—NEW ORLEANS

No. MC-F-8808

CONSOLIDATED COPPERSTATE LINES—PURCHASE (PORTION)—ENGLAND TRANSPORTATION, INC., AND ENGLAND TRANSPORTATION COMPANY OF TEXAS

No. MC-22167 (Sub-No. 21)

CONSOLIDATED COPPERSTATE LINES, EXTENSION—NEW ORLEANS

Investigation of the matters and things involved in these proceedings having been made, and the said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereof, which report is hereby made a part hereof:

It is ordered, That the applications, be, and they are hereby, denied, and that this order shall be effective 60 days from the date it is served; and

It is further ordered, That the authority granted by the orders of September 30, 1964, in Nos. MC-F-8798 and MC-F-8808, as amended by orders of February 5 and 15, 1965, in No. MC-F-8798 and by

order of February 15, 1965, in No. MC-F-8808, for temporary lease of the operating rights of England Transportation Co., Inc., and of England Transportation Company of Texas, shall be of no further force and effect at the expiration of 60 days from the date this order is served.

By the Commission.

H. NEIL GARSON,

(SEAL) Secretary.

APPENDIX D

Commission Order on Petitions for Reconsideration

Service Date March 14, 1968

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March, 1968.

No. MC-F-8798

STRICKLAND TRANSPORTATION CO., INC.—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 142)

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—NEW ORLEANS

No. MC-F-8808

CONSOLIDATED COPPERSTATE LINES—PURCHASE (PORTION)—ENGLAND TRANSPORTATION CO., INC., AND ENGLAND TRANSPORTATION COMPANY OF TEXAS

No. MC-22167 (Sub-No. 21)

CONSOLIDATED COPPERSTATE LINES, EXTENSION—NEW ORLEANS

Upon consideration of the record in the above-entitled proceedings and of:

1. Applicants' petitions, filed September 25, 1967, for reconsideration of the report and order, 104 M.C.C. 297, decided July 31, 1967, including requests for reopening for the purpose of receiving evidence tendered with the petitions, and for oral argument in support of the petitions;

2. Replies by protestants, (a) Arkansas-Best Freight System, Inc., (b) Gordons Transports, Inc., and Campbell Sixty-Six Express, Inc., (c) Ryder Truck Lines, Inc., (d) Central Freight Lines, Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., (e) Braswell Motor Freight Lines, Inc., and (f) Herrin Transportation Company;

3. Petition by Hill-Elliott, Inc., filed January 15, 1968, in No. MC-F8798, that it be substituted as the person in control of Strickland Transportation Company, Inc., transferee; and

It appearing, That except for editorial errors hereinafter corrected, the findings in the said report are in accordance with the evidence and applicable law; the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered, nor adequate cause for reconsideration or further hearing; oral argument is not deemed necessary; and the petition to substitute parties would be mooted by denial of the application and petitions for reconsideration:

It is ordered, That the said report, 104 M.C.C. 297, decided July 31, 1967, be, and it is hereby, corrected as follows, said corrections to be reflected in the bound volumes of the Commission's reports:

a. Revise the last sentence of footnote 3 on page 304 to read as follows: "The lower court was reversed by the Supreme Court, in *American Trucking* v. *A.T. & S.F. R. Co.,* 387 U.S. 397, decided May 29, 1967."

b. Revise lines 1-10 of the last paragraph on page 319 to read as follows:

While it is true that the district court in reviewing the *Piggyback Rules* case did express its view that a certificate to operate over the highways as a motor carrier did not authorize, nor was it utilized by the use of, substituted TOFC service, we are not inclined to accept that interpretation in this context. Not only was the court's decision in the *Piggyback Rules* case reversed by the Supreme Court, but the right to utilize TOFC service for all or a portion of its lines-haul operations was expressly provided in Rule 4(e),[7] a rule which was not under attack in that review of the case.[8] More-

It is further ordered, That the said petitions, except the petition to substitute parties, be, and they are hereby, denied.

It is further ordered, That the petition to substitute parties be, and it is hereby, dismissed as moot.

It is further ordered, That the order of July 31, 1967, shall be effective 60 days from the date this order is served; and

It is further ordered, That the authority granted by the orders of September 30, 1964, in Nos. MC-F-8798 and MC-F-8808, as amended by orders of February 5 and 15, 1965, in No. MC-F-8798 and by order of February 15, 1965, in No. MC-F-8808, for temporary lease of the operating rights of England Transportation Co., Inc., and of England Transportation Company of Texas, shall be of no further force and effect at the expiration of 60 days from the date this order is served.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

Statutes and Rules

1. Section 5(2) of the Interstate Commerce Act, in pertinent part, provides:

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to

the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others:

(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

• • • •

2. Section 207 (a) of the Motor Carrier Act (Part II of the Interstate Commerce Act), 49 U.S.C. § 307 (a), provides:

§ 207. Issuance of certificate.

(a) Issuance authorized to qualified applicants for regular routes and between fixed termini.

Subject to section 210 of this Act, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

3. The Commission's Lease and Interchange of Vehicles Rules, 49 C.F.R. Part 1057, in pertinent part, provide:

PART 1057—LEASE AND INTERCHANGE OF VEHICLES

Sec.

1057.1 Applicability.
1057.2 Definitions.
1057.3 Exemptions.
1057.4 Augmenting equipment.
1057.5 Interchange of equipment.
1057.6 Rental of equipment to private carriers and shippers.

AUTHORITY: The provisions of this Part 1057 issued under sec. 204, 49 Stat. 546, as amended; 49 U.S.C. 304.

SOURCE: The provisions of this Part 1057 appear at 32 F.R. 20056, Dec. 20, 1967, unless otherwise noted.

§ 1057.1 [307.1]* Applicability.

The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers.

§ 1057.2 [307.2] Definitions.

(a) *Authorized carrier.* A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of section 206,

* Former references, used in Commission's Report, in brackets.

207, or 209 of the Interstate Commerce Act, 49 U.S.C. 306, 307, or 309.

(b) *Equipment.* A motor vehicle, straight truck, tractor, semitrailer, full trailer, combination tractor-and-trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) *Interchange of equipment.* The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

* * * *

§ 1057.5 [307.5] Interchange of equipment.

Authorized common carriers may by contract, lease, or other arrangement, interchange any equipment defined in § 1057.2 [307.2] with one or more other such common carriers, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following conditions:

(a) *Interchange agreement to be specific.* The contract, lease, or other arrangement providing for interchange shall specifically describe the equipment to be interchanged; the specific points of interchange; the use to be made of the equipment, and the consideration for such use; and shall be signed by the parties to the contract, lease, or other arrangement, or their regular employees or agents duly authorized to act for them, in the execution of such contracts, leases, or other arrangements.

(b) *Operating authority of carriers participating in interchange.* The certificates of public convenience and neces-

sity held by the carriers participating in the interchange arrangement must authorize the transportation of the commodities proposed to be transported in the through movement and service from and to the point where the physical interchange occurs.

(c) *Through bills of lading required.* The traffic transported in interchange service must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

(d) *Safety inspection of equipment.* It shall be the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or to have it inspected in the manner provided in § 1057.4(c) [307.4(c)] and equipment which does not meet the requirements of the safety regulations shall not be operated in the respective services of the interchange carriers until the defects have been corrected.

(e) *Identification of equipment as that of the operating carrier.* Authorized carriers operating power units in interchange service shall identify such equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Motor Carrier Vehicles). Any removable device used to identify the operating carrier shall be on durable materials such as wood, plastic, or metal, and shall bear a serial number in the operating carrier's own series and such carrier shall keep a proper record of each identification device in use. The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed

on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment. Authorized carriers operating equipment in interchange service under this section shall carry with each vehicle so operated, except trailers and semitrailers, a copy of the contract, or other arrangement, while the equipment is being operated in the interchange service, unless a statement certifying that the equipment is being operated by it and identifying the equipment by company or State registration number, showing the specific point of interchange, the date and time of the assumption of responsibility for the equipment, and the use to be made of the equipment, is carried in the vehicle while it is operated in interchange service. Such statement shall be signed by the parties to the contract or other arrangement or their employees or agent.

(f) *Through movement involving more than two carriers, lessee considered as owner.* For the purpose of this section, a lessee of equipment on a through movement involving more than two carriers, shall be considered the owner of the equipment for the purpose of leasing the equipment for movement to destination or for return to the originating carrier.

• • • •

APPENDIX F

Sample Joint Tariff Notices

JOINT ROUTING CONCURRENCE

Date: April 16, 1962

Mr. A. B. Culbreth, Chief of Tariff Bureau
Southern Motor Carriers Rate Conference
P. O. Box 7347, Station C
Atlanta 9, Georgia

Gentlemen:

Please arrange to amend S. M. C. R. C. Tariff No. 166-G to provide specific routing between the carriers named below at the following interchange points:

SHREVEPORT, LOUISIANA

Issuing Carrier: STRICKLAND TRANSPORTATION CO., INC. (Item 30020)
P. O. Box 5689, Dallas 22, Texas
By: R. W. Collinsworth, General Traffic Mgr.
Signed: R. W. COLLINSWORTH

The above change is concurred in by:

Concurring Carrier: ENGLAND TRANSPORTATION COMPANY, INC. (Item 11345)
P. O. Box 1068
Address: New Orleans 4, Louisiana
By:
Signed: s/ [Illegible]
Date: APR 20 1962

NOTE: Concurring Carrier should mail original to Tariff Publishing Agency, duplicate to P. O. Box 5689, Dallas 22, Texas, and retain third copy.

JOINT ROUTING CONCURRENCE

Date: August 8, 1963

Mr. Harold Harvey, Chief of Tariff Bureau
THE EASTERN CENTRAL MOTOR CARRIERS
ASSOCIATION, INC., Agent
207 East Tallmadge Avenue
Akron 10, Ohio

Gentlemen:

Please arrange to amend ECMCA Tariff 26-I (Routing *Guide) to provide specific routing between the carriers* named below at the following interchange points:

Shreveport, La.

Issuing Carrier: STRICKLAND TRANSPORTATION CO., INC.
P. O. Box 5689, Dallas 2, Texas

By: R. W. Collinsworth, General Traffic Mgr.

Signed: R. W. COLLINSWORTH

The above change is concurred in by:

Concurring Carrier: ENGLAND TRANSPORTATION CO., INC.
P. O. Address: Box 3325, BYWATER STATION
City: NEW ORLEANS, 17, LA.

By: C. L. Callaway, President

Signed: C. L. CALLAWAY
Date: 8-12-63

NOTE: Concurring Carrier should mail original to Tariff Publishing Agency, duplicate to P.O. Box 5689, Dallas 2, Texas, and retain third copy.

APPENDIX G

Interchange Contract and Operating Procedures

1. *Interchange Contract*

STRICKLAND SYSTEM
3011 Gulden Lane
Dallas, Texas

TRAILER INTERCHANGE CONTRACT

We, the undersigned carriers, enter into this Contract governing our relationship with respect to interchange of trailers, and to make this Contract operative respecting interchange of individual trailers will cause to be executed the Interchange Receipts and Inspection Reports hereinafter mentioned. The term "trailer" as used in this Contract shall refer to any load-carrying vehicle without power.

1. At the time of each trailer interchange during the term of this Contract an authorized representative of each undersigned carrier shall execute, in multiple copies as the carriers may require, a Trailer Interchange Receipt and Inspection Report. The parties shall be bound by the notations on such Receipt and Inspection Reports hereafter executed and which are hereby expressly made a part of this Contract.

2. The carrier acquiring use of an interchange trailer, hereinafter called "Lessee," covenants and agrees with the carrier providing an interchanged trailer, hereinafter called "Lessor," to be bound by the following terms:

2.1. Lessee shall complete promptly and expeditiously the use for which the trailer has been interchanged and

return the trailer to the Lessor. Lessee accepts responsibility for return of interchanged trailers within a reasonable time to the Lessor.

2.2. Lessee shall be responsible to the Lessor of the trailer for the performance of this Contract by itself and by all other persons into whose possession such trailer may go until its proper return to the Lessor.

2.3. Lessee shall hold the Lessor harmless for any loss of or damage to the interchanged trailer and from all liability for damages to persons or property, other than that being transported therein, arising out of the use, operation, maintenance or possession of said trailer, or arising from any other cause, until said trailer has been returned to the Lessor and receipt issued therefor.

3. The Lessor covenants and agrees with the Lessee to be bound by the following terms:

3.1. Lessor shall equip the interchanged trailer with tires and tubes of proper size and with sufficient tread to assure safe and timely travel for the complete round trip contemplated. Thereafter, until the trailer is returned to the Lessor, repairs to tires and tubes shall be made by and at the expense of the carrier using the trailer at the time of such tire failure. In the event of a blowout or total failure of a tire or tube, the carrier in possession of the trailer shall furnish replacement tires and tubes to return the trailer to the carrier from whom the trailer was received, but shall retain such replacement tires and tubes upon re-delivery of the trailer to such carrier and shall return the blown-out or unserviceable tire and tube properly identified to Lessor at the point of interchange of said trailer.

In the event of failure to so return the blown-out or unserviceable tire and tube, payment therefor shall be made at the value thereof at the time of interchange.

3.2. Lessor shall equip the interchanged trailer with such safety and electrical equipment, in proper working condition, as required by the laws and regulations governing such interchanged trailer at the point of interchange, including, but not limited to, flashing turn signals with not less than twelve square inches of lens surface in proper working condition.

3.3 Lessor does not make any warranty or representation, express or implied, as to the fitness or condition of the trailer so interchanged, including tires and tubes, and the carrier acquiring the use thereof does so at its own risk.

4. Interchange will be made on a trailer for trailer exchange, with each carrier exchanging a trailer of like size and condition.

5. In the event an interchanged trailer requires repair or service while in the possession of the Lessee, and such repair or service is required only as ordinary wear and tear as distinguished from damage to such trailer, the Lessee shall cause the repair or service to be performed and the Lessee shall absorb as its expense all such costs up to and including $25.00. In the event such repair or service exceeds $25.00, the Lessee shall charge back to the Lessor all such charges; provided, however, the Lessee shall first obtain consent from the Lessor for any charge or charges totaling more than $25.00 to any such interchanged trailer.

In the event an interchanged trailer is damaged, other than as provided for in the preceding paragraph, the car-

rier in possession at the time the damage occurred shall, by repair, restore it to the condition in which it was received and, in the event of failure of such carrier to make such repair, it shall, nevertheless, be responsible for the cost of such repairs. If the interchanged trailer is totally destroyed or damaged beyond reasonable repair, the Lessee shall retain the damaged trailer and pay Lessor the replacement value thereof.

6. This Contract and the Trailer Receipt and Inspection Reports shall constitute the entire agreement between the parties and no verbal amendment or modification thereof shall be permitted. This Contract may be supplemented or amended only by a written instrument containing such supplement or amendment.

7. This Contract is for a period of one year from date hereof, and shall continue in effect from year to year thereafter until terminated by the parties. Either party to this Contract may terminate same as of any time by giving the other party ten days notice in writing of such termination by registered United States Mail addressed to the other party at its last known mailing address.

Executed at Dallas, Texas, this 27 day of Nov. 1962
Strickland Transportation Co., Inc. Certificate No. .....
By: (Illegible), Operating Manager.

Executed at New Orleans, this 27 day of Nov. 1962
England Transportation Co. Certificate No. .....
By: C. L. CALLAWAY, President.

2. *Operating Procedures*

July 23, 1962
New Orleans, La.

Mr. El Roy Miller, Outbound Dock Foreman,
New Orleans, La.

Mr. J. E. Smith, Terminal Manager

Effective Monday night, July 23rd, and each week-day night Monday through Friday, we will have a schedule that will be loaded for St. Louis and beyond which will be transferred over the road by means of England Transportation, who will pick up this unit at our terminal at or around 8:30 P.M.

The following is a list of instructions that you are to see are completed, and should there be any questions regarding this, please contact the writer.

No. 1. You are to see that the load is properly braced, blocked, broken down, and sealed.

No. 2. You are to make a trailer interchange report showing any discreprancy and secure signature of England's driver. You will be supplied with an envelope containing the freight bills, bearing on it the trailer number, seal number, and destination, which will be prepared by our billing department.

No. 3. You will be supplied with a delivery receipt, or dead-head billing, that will be made out from Strickland-New Orleans to Strickland-Shreveport, bearing on same the trailer number, seal number, and weight, which you are to secure signature of Eng-

land's driver upon same, giving to the England driver one copy of the bill, along with the sealed envelope.

Please comply with the above instructions.

Very truly yours,

s/ J. E. SMITH
J. E. Smith—Terminal Manager

JES:gp
cc: Mr. Irby Gomez, Office Manager

* * * * *

July 23, 1962
New Orleans, La.

Mr. Clinton Hathaway, Inbound Dock Foreman,
New Orleans, La.
Mr. J. E. Smith, Terminal Manager

You will start receiving on Wednesday, July 25th, a trailer from England Transportation at approximately 3:00 A.M., which will be a St. Louis schedule, and which schedule you should receive each day following for five days of the week at or around three A.M. on Mondays through Fridays.

Following is a list of instructions that are to be followed, and should there be any questions on this, please contact the writer.

No. 1. England will cut a dead-head bill covering the load and you will sign their delivery receipt.

No. 2. Make a trailer inspection report and secure signature of England's driver on same.

No. 3. Check seal to see that the one applied at St. Louis, that will recorded on the envelope containing the bills, is one and the same.

Please see that these instructions are followed as outlined above.

Very truly yours,

s/ J. E. SMITH
J. E. Smith—Terminal Manager

JES:gp
cc: Mr. Irby Gomez, Office Manager

* * * * *

July 23, 1962
New Orleans, La.

Mr. Charles Holmes, Rate Clerk, New Orleans, La.
Miss Jo Hogancamp, Billing Clerk, New Orleans, La.
Mr. J. E. Smith, Terminal Manager

Effective Monday, July 23rd, and each successive weekday night, that being Monday through Friday, we will have a load that will be loaded for St. Louis and beyond, which will be transported over the road via Shreveport Terminal in connection with England Transportation.

The following is a list of instructions that will be followed, and should there be any questions regarding this, please contact the writer.

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No. 1. After all bills are prepared you are to see that all copies of the freight bills are stamped with the rubber stamp that is being supplied to you this date, reading "STCO NOLA ENGLAND SHREVEPORT STCO".

No. 2. All bills are to be manifested, showing the freight bill number, the shipper, the consignee, weight, and destination.

No. 3. All number six (6), or consignee's copy, of each freight bill is to be pulled and mailed, along with a copy of the manifest, to the attention of Mr. Callaway, England Transportation, Box 3327, New Orleans 17, Louisiana.

No. 4. One copy of the manifest, along with the bills, will be placed in an envelope that is to be sealed, and upon the envelope place the trailer number, the destination, and seal number.

No. 5. One copy of the manifest is to be forwarded to Mr. M. H. Burcham, Comptroller, Strickland Transportation Co., P. O. Box 5689, Dallas, Tex.

No. 6. You are to prepare a freight bill showing shipper as Strickland Transportation, New Orleans, consignee, Strickland Transportation, Shreveport, the route to be shown as Strickland-New Orleans-England-Shreveport-Strickland, and this freight bill is to show one trailer load of mixed freight, the weight of the entire load, the trailer number, and the seal number.

No. 7. You are to give the bills and manifests, which are in a sealed envelope, and the dead-head freight bill,

to the Outbound Dock Foreman, Mr. Miller, as soon as you have this completed, and he will further handle.

Your cooperation in following the above instructions will be appreciated.

Very truly yours,

s/ J. E. Smith
J. E. Smith—Terminal Manager

JES:gp
cc: Mr. Irby Gomez, Office Manager, New Orleans, La.